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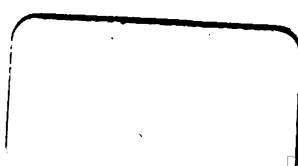
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OHIO

BY

GEORGE B. OKEY

REPORTER

NEW SERIES
VOLUME XLIV

CINCINNATI
ROBERT CLARKE & CO
1887

JUDGES OF THE
SUPREME COURT OF OHIO,

For the time commencing December 16, 1885, and ending February 9, 1886.

HON. GEORGE W. McILVAINE,	CHIEF JUSTICE.	
HON. MARTIN D. FOLLETT,	}	JUDGES.
HON. WILLIAM T. SPEAR,		
HON. SELWYN N. OWEN,		
HON. W. W. JOHNSON,		

Attorney-General,
HON. JACOB A. KOHLER.

JUDGES OF THE
SUPREME COURT OF OHIO,

For the time commencing February 9, 1886, and ending November 9, 1886.

HON. SELWYN W. OWEN,	CHIEF JUSTICE.	
HON. MARTIN D. FOLLETT,	}	JUDGES.
HON. WILLIAM T. SPEAR,		
*HON. W. W. JOHNSON,		
HON. THAD. A. MINSHALL.		

Attorney-General,
HON. JACOB A. KOHLER.

*Hon. W. W. Johnson resigned November 9, 1886. Hon. Franklin J. Dickman was appointed to fill the vacancy so caused, and was sworn into office, November 11, 1886.

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JUDGES OF THE
SUPREME COURT OF OHIO,

For the time commencing November 11, 1886, and ending February 9, 1887.

HON. SELWYN N. OWEN, CHIEF JUSTICE.

HON. MARTIN D. FOLLETT, HON. FRANKLIN J. DICKMAN, HON. WILLIAM T. SPEAR, HON. THAD. A. MINSHALL,	}	<i>Judges.</i>
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Attorney-General,
HON. JACOB A. KOHLER.

JUDGES OF THE
SUPREME COURT OF OHIO,

For the time commencing February 9, 1887, and ending March 1, 1887.

HON. SELWYN N. OWEN, CHIEF JUSTICE.

HON. FRANKLIN J. DICKMAN, HON. WILLIAM T. SPEAR, HON. THAD. A. MINSHALL, HON. MARSHALL J. WILLIAMS.	}	<i>Judges.</i>
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Attorney-General,
HON. JACOB A. KOHLER.

(iv)

IN MEMORIAM.

SUPREME COURT ROOM, *April 21, 1887.*

W. W. JOHNSON, recently a member of this court, having departed this life on the second day of March last, the court appointed Chauncey N. Olds, J. William Baldwin, Wells A. Hutchins, Moses M. Granger, and Henry S. Neal, members of the bar of this court, to prepare and present to the court, for insertion in the Reports, a suitable memorial of the public services and character of Judge JOHNSON.

The committee submitted the following, which was approved by the court and ordered to be inserted in Volume 44 Ohio State Reports, as a fitting tribute to the eminent character and public services of the deceased.

"The undersigned heretofore appointed by the supreme court of the state of Ohio, to prepare and present to said court a memorial sketch of the life and public services of the late WILLIAM W. JOHNSON, a justice of said court, do respectfully report the following:

"WILLIAM WARTENBEE JOHNSON was born near Chandlerville in the county of Muskingum, state of Ohio, on the 26th day of August, 1826. He attended the common schools of his neighborhood, was a student in Muskingum College at New Concord, and subsequently taught in the schools of said county. As a scholar and teacher he was noted for his studious habits, his proficiency, and his thoroughness.

"In the fall of 1849 he commenced the study of law in the office of Hon. Charles C. Converse, then speaker of the Ohio senate, and afterward a judge of this court. In 1852 he was admitted to the bar, and began the practice of the law at Ironton, Lawrence county, Ohio, and at once took a commanding position among the able lawyers then practicing in that part of the state. In 1858, at the request of his brother attorneys, he became candidate for, and was elected judge of the court of common pleas for the seventh judicial district, and served in that capacity until the fall of 1866. Two years later he returned to the bench, remaining there until 1872, when, owing to ill health, he retired.

"In 1876 he was appointed one of the judges of the first supreme court commission of Ohio, and served during the life of that commission. At the fall election, 1879, he was elected judge of this court,

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taking his seat February 9, 1880, was re-elected in October, 1884, and resigned, because of ill health, November 9, 1886.

"His judicial career, almost equally divided between the court of the people and the highest judicial tribunal of the state, covered a period of almost twenty years—years fruitful of weighty questions in law and government, yet his instinctive honesty of purpose, and the vigorous qualities of his mind, broadening and strengthening with his advance in life, enabled him to discharge wisely, faithfully, and conscientiously every duty, and won a conspicuous place among the public men of the state, and proved him the peer of the able jurists who had preceded him upon the bench.

"As a man he was pure, and of incorruptible integrity; as a judge, careful, impartial, laborious and faithful. A thirst for knowledge, supported by a firm will and tireless application, made him learned, while his habits of patient and discriminating consideration, fortified by a lofty, almost stern integrity, kept him just. He was a wise and honest citizen. His personal character was beyond reproach, and his example in all the walks of life was worthy of emulation. He was, throughout his life, a firm believer in the virtue and value of the Christian religion, was long an active vestry-man, and later a professed member of the church.

"In October, 1854, Judge JOHNSON was married to Miss Martha E. Blocksom, daughter of the late Judge Blocksom, of Zanesville, Ohio, who still survives him. Two sons were born unto them, both of whom preceded their father to the grave. Their untimely death, especially that of the survivor, then just approaching manhood, in 1884, deeply and permanently affected him, and with the labors of his office greatly lessened his power to struggle against the fatal malady then already in his system. Amid sorrow, disease, and pain, he persevered in public duty until loss of sight and gradual paralysis confined him at home. On March 2, A. D. 1887, death gave him a welcome release from mortality and its pains, and opened to him the gates of immortality and its pleasures in the higher and nobler service in the universe of God.

"These thoughts and words have, most of them, already been voiced by those who have known Judge JOHNSON from his boyhood; and all who met him in his manhood and in his later life willingly join in like testimony to his purity and worth. Such a life as his well deserves high honor from courts and bar, and now that he has departed forever therefrom, it is fitting that conspicuous notice should be taken of his career, both as a tribute to his memory and an incentive for imitation and emulation by, and encouragement unto, those yet engaged in their responsibilities and labors.

"Wherefore, The undersigned submit the foregoing to the court for its approval and order that, as an expression of the admiration and respect entertained for the memory of WILLIAM W. JOHNSON, deceased, the foregoing memorial be entered upon the journal of this court, and that a copy of the same be certified and forwarded to the widow of the deceased, and one also furnished for insertion in the next volume of the reports of this court.

Respectfully submitted,

"CHAUNCEY N. OLDS,
"J. WILLIAM BALDWIN,
"WELLS A. HUTCHINS,
"MOSES M. GRANGER,
"HENRY S. NEAL."

IN MEMORIAM.

SUPREME COURT ROOM.

Judge RUFUS P. SPALDING, formerly a member of this court, having departed this life on the 29th day of August, 1886, it is ordered that Allen G. Thurman, R. A. Harrison, and Franklin J. Dickman, members of the bar of this court, be appointed to prepare and present to the court a biographical sketch of the public services and character of Judge SPALDING for insertion, with the action of the court thereon, in the next volume of the decisions of the court.

Franklin J. Dickman, from that committee, afterward submitted the following, which was approved by the court, and ordered to be published in Volume 44 of the Ohio State Reports :

"RUFUS PAINE SPALDING was born May 3, 1798, at West Tisbury, Massachusetts. His father was Dr. Rufus Spalding, an eminent practitioner of medicine. When fourteen years of age, he accompanied his father from Martha's Vineyard to Norwich, Connecticut, where the family settled. He entered Yale College, and graduated in 1817. On leaving college he entered the law office of Chief Justice Swift, of Connecticut; and upon admission to the bar, went to the then extreme west to commence practice, and at Little Rock, Arkansas, opened an office with Samuel Dinsmore, afterward governor of New Hampshire. After remaining there a year and a half, he removed to Trumbull county, Ohio, settling at Warren, where he remained sixteen years. From this place he removed to Ravenna, in the adjoining county of Portage. While at Ravenna, he was elected to a seat in the Ohio house of representatives. During his term in the legislature, the county of Summit was formed, and he removed thither, taking up his residence at Akron. At the election in 1841, he was chosen to represent the new county in the legislature, and on the organization of the House of Representatives, was made speaker. In the legislative session of 1848-9 the general assembly elected him a judge of the supreme court of the state for the term of seven years. When four years of the term remained to be served, the new constitution took effect, and the office of judge became elective by the people. He refused to be a candidate for the judicial office in a popular canvass, and his services were thus lost to the bench. On leaving the bench, he removed to Cleveland, Ohio, and actively engaged in the practice of the law. But his professional activity did not abate his interest in the political movements of the day.

Born during the administration of the elder Adams, he reached the age of early manhood when the Jeffersonian school of politics was dominating all others, and, adopting its teachings as his standard of political faith, he found himself, by an easy transition, in the ranks of the Democratic party. With that party he remained until the fugitive slave law was passed in 1850, when he joined the Free Soil party, which was pledged to oppose the extension of slavery. When the Republican party was organized, he became prominent in its councils. In October, 1862, he was elected by the Republicans to represent the 18th congressional district of Ohio in congress, and he at once attained a distinguished rank in the house of representatives. In 1864 he was re-elected to his seat in congress, and in 1866 was chosen for a third term. With this, the 40th congress, his legislative career closed, having declined a further nomination, and announced his purpose of retiring from public life.

"Judge SPALDING was cast in no ordinary mold, and his marked individuality would have given him prominence in any community. He had a long and honored career, and the history of the Ohio bar, of the judiciary, legislation, and politics of our state, could not be faithfully written, without assigning to his name a conspicuous place. On whatever arena of action he entered, he was sure to act a prominent part. In the contests of the forum he was a leading champion, always fearless, and always armed and equipped. On the bench, as evidenced in the 18th, 19th, and 20th volumes of the Ohio Reports, he left his impress as a laborious, upright, learned, and profound judge and jurist. In the legislature of Ohio, his name was identified with many of the most important measures, and many of the most stirring scenes that have marked that legislative assembly. And in our national congress, during the most eventful period of our history, he was distinguished as one of the intellectually strong men, as an accomplished and forcible debater, as a prudent and sagacious statesman, of broad views and wide range of knowledge in public affairs.

"Measuring him as a lawyer, his acquirements extended over an unusually wide field. He was not a mere specialist, but by a comprehensive mastery of general principles, he was able to successfully grapple with the most varied questions. Like the model New England lawyers of the olden school, he received his first introduction to the science of the law, through such elementary treatises as Coke upon Littleton, and Fearne on Contingent Remainders. He was an adept in special pleading, and it is said, that when a young man, he carefully read the reports of Chief Justice Saunders, and collated from them a book of precedents for future use. In the department of equity, he had thoroughly studied that wise and rational system of jurisprudence, in its principles and practice as illustrated by the English chancery decisions from Lord Hardwicke down to our own times. After settling in Cleveland, he became extensively engaged in admiralty causes, and was generally

recognized as of the highest authority in cases of collision, marine insurance, average, contribution, and other branches of maritime law. He was frequently retained in important patent causes, and achieved distinction in the supreme court of the United States in the argument of questions of constitutional law. In the presentation of his clients' cause to court or jury, he was a clear, convincing, earnest, and eloquent advocate. He possessed unusual power of statement, and his precise, though ample and vigorous presentment of fact, carried with it oftentimes such force and conviction as to render unnecessary any formal process of reasoning.

"While learned in his profession, he kept alive his taste for elegant literature, and had a just appreciation for literary merit. In history ancient and modern, he had been an accurate and philosophic student. He was familiar with the best of the Latin classics. He had a fondness for the early English dramatists, and drew upon their treasures for illustrations and embellishment. But his fondness for letters and their refining influence did not impair the robustness of his mind. Though like a Corinthian column, he was ornate, he stood stately and strong upon a solid pedestal. His mind was of the firmest, and most durable texture. At the age of eighty-eight, the rays of his intellect seemed not to have paled or faded in the slightest degree. His memory for detail showed no signs of weakening. His analysis of legal questions, and his appreciation of legal argument, during the last year of his life, were as thorough and discriminative as they were at the age of sixty years.

"Judge SPALDING was endowed with traits of character that could not fail to challenge the admiration of all who knew him. He was sincere and unambiguous in his utterances, and it would be difficult to find any one who could truthfully say that he had ever been intentionally deceived by him. In all his engagements with his fellow-men, he was the soul of good faith and fidelity to his promises. He was a devoted friend, and until his confidence was shaken by unworthy conduct, was ready to stand by you in sunshine and in storm. A trait, eminently characteristic of him, was a readiness to make reparation, whenever he found that in an unguarded moment he had wounded the feelings of another, or done him any injustice. He was liberal to the poor and needy, and when those who were desolate and oppressed came to him for professional aid, the first and last object of his thoughts was the redress of their wrongs. He seemed to care but little for the accumulation of wealth, and it exerted but little influence with him, when he found that it was not used as an instrument of good.

"In the latter part of his life, Judge SPALDING accepted with child-like faith the cardinal doctrines of the Christian religion. He was a communicant, at the time of his death, in the Episcopal church, and for many years he had been constant and devout in his religious observances. In his last sickness he was cheered by the light divine, and

no fear or trembling came over him when the solemn realities of another world were about to dawn upon his vision. Heaven had bounteously lengthened out his days, and at their close lighted up his passage across the dark river.

"Such a man might be a copy to these younger times."

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RULES.

RULE III.

When a cause on the general docket is argued orally, the time allowed for each side shall not exceed one hour, unless, for special reasons to be adduced before the argument commences, the court shall extend the time.

RULE VI.

A syllabus of the points decided by the court in each cause shall be stated in writing by the judge assigned to deliver the opinion of the court, which shall be confined to the points of law arising from the facts of the cause, that have been determined by the court. And the syllabus shall be submitted to the judges concurring therein, for revision, before publication thereof; and it shall be inserted in the book of reports, without alteration, unless by consent of the judges concurring therein. [This rule has been in force since 1858.—REPORTER.]

[This volume contains the cases selected for report, decided since January 1, 1886, and prior to March 1, 1887.—REPORTER.]

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO.
JANUARY TERM, 1886.

HON. GEORGE W. McILVAINE, CHIEF JUSTICE.
HON. MARTIN D. FOLLETT,
HON. WILLIAM T. SPEAR,
HON. SELWYN N. OWEN,
HON. W. W. JOHNSON,

} Judges.

THE STATE *ex rel.* BELFORD *v.* HUESTON.

Statutory construction—Meaning of term “senior judge” in act of April 7, 1882.

1. The term “senior judge” in the act of April 7, 1882 (79 Ohio L. 79), providing for the appointment of an assistant prosecuting attorney in Lucas county, is intended to designate the judge who, at the time of such appointment, has served the longest under his present commission.
2. Hence, where an assistant prosecuting attorney had been appointed October 9, 1885, by a judge, resident of Lucas county, whose existing term of office commenced November 11, 1883, and had qualified and entered upon the discharge of the duties of the office, an appointment November 3, 1885, by a judge whose existing term of office commenced February 9, 1885, was inoperative, although the judge making the latter appointment had been judge under former commissions, and had been longest in continuous service.

QUO WARRANTO.

The facts appear in the opinion.

The State *ex rel.* Belford v. Hueston.

James Lawrence, attorney-general, and *Doyle & Scott*, for relator.

Kent & Kent, for defendant.

SPEAR, J. By this proceeding the defendant, James M. Hueston, is called upon to show by what authority he assumes to hold the office of assistant prosecuting attorney for the county of Lucas.

The act of April 2, 1882 (79 Ohio L. 79), provides for the appointment of assistant prosecuting attorneys in the counties of Hamilton, Cuyahoga, and Lucas. In the first named county, the presiding judge is given the power to appoint, in the second named, the judges of the court of common pleas are given that power, and in the last named (Lucas), the provision is that "in Lucas county the senior judge of the court of common pleas residing therein, may appoint an assistant prosecuting attorney."

The relator claims the office of assistant prosecuting attorney by appointment October 9, 1885, by one of the resident judges of Lucas county; the defendant claims the same office by appointment November 3, 1885, by another resident judge of said county.

The question is, which of the two judges thus assuming to appoint an assistant prosecuting attorney was the "senior judge?"

The facts in the case are agreed upon, and, in so far as they are deemed material, are as follows: At the dates of the two appointments named there were three judges of the court of common pleas residing in the county of Lucas, one who was elected in October, 1883, and entered upon a full term of five years from November 11, following; another who was elected in October, 1884, and entered upon a full term of five years on the 24th of that month, and a third elected at the same election, and who entered upon a full term of five years on the 9th day of February, 1885. On the 9th day of October, 1885, the judge whose term commenced November 11, 1883, appointed the relator, Irvin Belford, as assistant prosecuting

attorney. The relator immediately took the oath of office, entered upon the discharge of the duties, and continued uninterruptedly until the 3d day of November, 1885, on which day the judge who entered upon his present term February 9, 1885, holding at the time the criminal term, refused to recognize the relator, and appointed the defendant to that office, who at once took the oath of office, and entered upon the discharge of the duties of such assistant in that court. The judge who made this last appointment was, at the time, the judge longest in continuous service, having entered upon his first term February 9, 1875, upon his second term February 9, 1880, and upon his present term February 9, 1885, having served continuously during the time, and all of the time residing in Lucas county. The first act authorizing an assistant prosecuting attorney for Lucas county was passed May 11, 1878. Appointments were made under this law, but they are not understood to be of consequence here. April 2, 1880, the law was amended, giving the appointment of assistant to the prosecuting attorney himself. That law remained in force until April 7, 1882, when the present law took its place. At the time of this last change there were three judges resident in Lucas county, one whose term began November, 1878, one whose term began November, 1879, and one whose term began February, 1880, the latter being the same judge, serving his second term, who made the appointment of defendant November 3, 1885. The first appointee under this law was the defendant, Hueston. He was appointed October, 1882, by the judge who commenced his first term November, 1878, and the appointment was acquiesced in by everybody. Again, in October, 1883, the same judge appointed the same gentleman, and again everybody acquiesced. In October, 1884 (the term of the judge who made the previous appointments having expired), the defendant was appointed by the judge who made the appointment November 3, 1885. The defendant served one year under that appointment, and there

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was a vacancy in the office at the time of the appointment of the relator, October 9, 1885.

Whether the act of the judge making the last appointment of the defendant, considering that the relator was at the time an officer *de facto*, in possession of the office, and performing its duties, was or was not valid, irrespective of the question of who was the senior judge, we are not called upon to determine, because the relator prefers to waive that point and rest his case upon the claim that his appointment was made by the judge who at the time was the senior judge of Lucas county.

The question to be determined is, whether the senior judge was the one who had served longest under his present commission, or the one who had been longest in continuous service? It is not insisted by any one that the word "senior" applies necessarily to the judge who is oldest in years. Indeed we are not advised as to the age of the several judges.

On the part of the defendant the contention is that "senior judge" is one longest in continuous service; this because, neither by the constitution nor by statute, is any distinction made between common pleas judges, nor any power vested in one that is not in all; that the word "senior" has no technical legal significance, and that the popular definition in common use, and as given by lexicographers, to wit: "one that is older in office, or one whose first entrance upon an office was anterior to that of another," must prevail.

On the part of the relator the contention is, that "senior judge" means the oldest in commission; this because, first, the words have a technical meaning in Ohio legislation, given to them by the history, custom, and uniformity of legislation of the state in reference to the judiciary; second, adopting the word *senior* as commonly defined, or given by lexicographers, "elder" or "eldest" as applied to the service of judges in Ohio, it will mean the same thing; and third, that this construction is the one given to the word by contemporaneous local interpretation, and, being a local

law, such mode of arriving at its meaning is the best method, and is controlling.

We are of opinion that the term "senior judge" in this statute applies to the judge who, at the time an appointment of assistant prosecuting attorney is to be made, has served the longest under his present commission, and will endeavor to state some considerations which lead to that conclusion. This becomes an easy task by reason of the aid derived from the oral arguments and briefs of counsel, supplemented by the brief of defendant in person. The case is one of first impression in this state, and has been reasoned out upon principle by the counsel. The reasoning in support of the relator's position upon what we regard as the controlling point in the case, is so satisfactory, that we are content to adopt it in substance in treating of that question.

The question is not necessarily what that term means by its general use, nor what it means in legal parlance out of Ohio, but what it means here in this state, and in this statute. We are, if we can, to ascertain what the legislature intended by its use in this law. For, "while the popular or received import of words furnishes a general rule for the interpretation of statutes, they must be interpreted according to the intent and meaning, and not always according to the letter; and where the intent can be discovered, it should be followed, though such construction seem contrary to the letter of the statute."

The word "senior" has not received interpretation, so far as known, judicially in this state, and the only other use of the word in our legislation that is recalled is in section 3054 of the Revised Statutes, wherein it is provided that "the command of any military force called into service under the provisions of this title shall devolve upon the senior officer of such force;" section 3048, providing that "an officer who has served continuously in the same grade for more than one term, . . . shall take rank from the date of his first commission in that grade." This statute applies to the military organization of the state only. And though

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it be assumed that by the word "senior" here is meant the one longest in continuous service, it by no means follows that the legislature, in using the word in connection with an entirely different subject-matter, intended it should have the same meaning. In the one case it would naturally be inferred that the term would follow military usage, while in the other its meaning would be gathered from practice in civil affairs, and especially in affairs connected with the judiciary.

Reference to the definitions given by lexicographers scarcely aids in getting at the meaning of the word "senior" in this statute, for it is hardly probable that the legislature gave much attention to the study of etymology in the adoption of the word, or to the definition given in the dictionaries. The meaning is given by Webster, as adjective, "one more advanced in life; one older in office or dignity; prior in age or rank; elder;" and as noun, "one older in office, or whose entrance upon an office was anterior to that of another." Taking this language alone, it may be construed to mean, not one who entered upon his present term of office first, but one who has been longest in the office. But no meaning of a word which has received a construction, by law or uniform custom, can be adopted from the dictionaries in conflict with that construction. And where a word is reconcilable with law or established custom in the particular manner in which it is used, a different meaning can not be given to it upon the authority of a lexicographer. Hence, if we can ascertain that this word has a meaning in Ohio in reference to the judiciary, understood by custom and the provisions of the law relating to courts, it is reasonable to assume that the legislature made use of it intending it should receive that meaning in any construction of the law.

It is believed that neither in our present constitution nor laws is importance attached to the length of service of a judge beyond that of his existing term; but every-where, in the debates in the convention which framed the constitution of 1851, and in legislation following its adoption, the

ranking judge, or chief-justice, however designated, was he whose term of service, not holding by appointment or to fill a vacancy, would soonest expire.

Looking back to see how the subject was treated prior to the date mentioned, we find that the general assembly which met immediately after the adoption of the constitution of 1802 (which instrument created the supreme court to consist of three judges, with power to the assembly to add another), by act of April 15, 1803, entitled "an act organizing the judicial courts," provided that one of the judges of the supreme court "shall be commissioned by the governor chief judge of said court, and the other two judges, and all future judges of said court, shall have precedence according to the date of their commissions, or where their commissions are of the same date, then according to their respective ages." As to the common pleas courts, the constitution created them each to consist of a president and associate judges. An act amending the previous statutes on the subject of courts, passed February 16, 1810, provided that the judges of the supreme court, 'shall have precedence according to the date of their commissions, or where their commissions are of same date, then according to their respective ages; and the judge entitled to precedence shall be styled chief judge of said court.' This remained unchanged until the act of February 18, 1824, in which the idea of precedence by reason of continuous service was first recognized, the act providing that the four judges shall have precedence according to the dates of their commissions, but in case either shall be elected for two or more terms in succession, then he shall take precedence according to the date of his first commission, etc. These provisions were again embodied in the act of February 7, 1831, and remained in force until the law was abrogated by the adoption of the constitution of 1851. And, thus having before them the earlier and the later policy on the subject, and having the question of precedence in the supreme court to provide for, the legislators of the assembly of 1852 discarded the later and returned to the earlier policy, providing in the act relating to the or-

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ganization of courts of justice, and prescribing their powers and duties, passed February 19, 1852, substantially what is now embodied in section 411, Revised Statutes, that "the judge of the supreme court having the shortest time to serve, not holding by appointment or election to fill a vacancy, shall be the chief justice, and as such shall preside at all terms of the supreme court; and in case of his absence, the judge having in like manner the next shortest time to serve shall preside in his stead."

This change by the legislature is significant, and the purpose is clear; to give no dignity or importance to length of service merely, but to determine rank wholly by the length of service under the present authority or term of office. So, too, with the circuit court. Section 451*b* (81 Ohio L. 170), makes precisely the same provision as to a presiding judge in that court. No direct legislative provision is made as to precedence among judges of the courts of common pleas. A sufficient reason for this omission is found in the fact that the court is held by one judge only, and, therefore, each judge is a presiding judge. The law in this respect can scarcely be regarded as throwing light upon the question one way or the other.

In passing, we may refer to section 848 of the Revised Statutes, regarding county commissioners, which provides that the one whose term first expires shall be president, and shall preside at the meetings of the board.

In Ohio the term of a judge is fixed, determined. As to judges of the supreme court, and court of common pleas, it is five years, as to the circuit court it is six years, and as to the probate court three years. The term of the common pleas judge is made five years by the constitution itself. There is no such thing as holding over; no provision is made that the incumbent (when elected) shall continue until his successor is elected and qualified, and if there is a failure to elect, the office is vacant. For every purpose the judge goes out at the expiration of the fixed term; if he is a judge after that, it is because of a new election and qualification, and he is just as much a new judge as though

he had succeeded another. One term can not be tacked upon another for the purpose of adding to rank, title, power or pay. And with this view the term "elder in office" seems reconcilable with the idea simply of being elder in office under his present title to his office. Sections 555 and 556 make it the duty of one elected to a judicial office, within twenty days after receiving his commission, to take the oath required by the constitution and laws of the state, and transmit a copy of such oath to the clerk, and when he does not so qualify and transmit, he shall be deemed to have refused the office, and it shall be considered vacant. One whose former term has just expired, or is about expiring, is not exempted from the requirements of this statute. He is just as much bound to qualify in the manner provided as a new man would be, and if he fails in that he fails in his office. No power remains in his hands beyond the one term by reason of the authority given, and as to power beyond that it depends wholly upon the new lease, upon the new election, and the new qualification. This is the policy of our constitution, and our law, and the legislature must be held to have framed this statute in the light of these provisions, and of this policy.

Again, it can hardly be assumed that the legislature intended to place, and to continue the duty of appointment upon any one man. It could not be presumed by that body that any judge would be continued beyond his present term, and his successor would be junior to those of his associates whose terms expired at an earlier date. And in such case the change in the *personnel* of the judges would of necessity change the seniority, no two of the commissions bearing the same date.

The opinion of the justices to the governor and council, 126 Mass. 608, was cited by counsel for defendant. The opinion quotes from the Massachusetts statute: "Whenever a vacancy occurs in the office of sheriff in any county, the senior deputy sheriff in service shall perform all the duties required by law to be performed by the sheriff, until the office is filled in the manner required by law." In the

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opinion the court say, that the legislature has, by the use of the words "senior deputy sheriff in service" designated the one who has been longest in office continuously. How the deputies were appointed is not shown to us, nor is it shown whether they continued under their original appointment until removed, or their appointment died with their principal, and they were reappointed with each new sheriff. The use by the legislature of the words "in service" would imply that standing alone the word "senior" would not mean oldest in service; if the word "senior" alone implied longest in continuous service, then the words "in service" would be clearly superfluous, and we are not swift to charge the general court of Massachusetts with embodying words in the statutes which have no meaning. In the language of Judge Thurman, in *Bloom v. Richards*, 2 Ohio St. 402, "mere idle and useless repetitions of meaning are not to be supposed, if it can be fairly avoided."

But though this opinion be as strong for the defendant as is claimed, yet while considering the weight to be given to it, we should keep in mind that in Massachusetts the policy of the law has been from colonial days, and is now in large measure, to continue men in office for long periods; the courts are supplied with judges for life, and in many respects the reverse of the Ohio policy is favored there. This is believed to be true of the state of Connecticut and of others of the older states.

If it were profitable to look outside of our own state to find precedents, the research of counsel has supplied us with a long line, in which, in some cases the fundamental law, and in others the statutes, embody the same policy as is shown by the provision of our law as to rank in the supreme and circuit courts.

The law of Nevada provides that the senior justice in commission shall be chief justice, and in case the commission of any two bear the same date, they are to determine by lot who shall be chief justice. In Kentucky the constitution provides that the judge having the shortest time to serve shall be styled the chief justice of Kentucky. Sim-

ilar provisions are found in Oregon, Michigan, Georgia, West Virginia, Mississippi, Missouri, California and Nebraska, while in nineteen states there is no provision for the selection of a chief justice, no such officer seeming to be known to the law, and in the remaining states the matter is either determined by the governor, who appoints the judges, or by the legislature which elects them, or the choice is made by the court itself. In the newer states of the west and south, the policy of short, determinate terms is favored, while in many of the older Atlantic states the policy of priority by reason of service is recognized and encouraged. In our judgment the policy of Ohio is clearly in accord with that of the former class of states, and in the light of this policy, and of the custom which has grown up under it, we think the language of the law in question should be construed.

And whatever of respect and deference may be justly due to long experience and honorable service on the bench, such considerations can not, as we think, be dignified into a claim of rank by right, and thus outweigh the clear policy of the law.

We are not impressed with the conclusiveness of the claimed local construction of the law, based upon the apparent recognition by the judges of Lucas county, and the defendant in this case, of the validity of the appointments made October, 1882, and October, 1883, both of which were made by a judge who assumed to be the senior judge because he held by what was, at the time, the oldest commission, while another judge—the one who made the appointment of the defendant in this case—had been many years the longest in continuous service. The point is not without significance, but had those appointments been made by the judge then longest in continuous service, and thus an exactly opposite local construction given to the law, we would hardly be willing to hold that such construction should prevail as against satisfactory reasons for a contrary view. The statute of 1882 can not be treated as an ancient one in such sort that the opinion of sages

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learned in the law at the time of its passage would be binding upon courts in this year of grace, 1886, nor is the claim of contemporaneous local construction aided by the doctrine of *stare decisis*, no rule of or right to property having obtained, and surely not by the application of any rule of estoppel. However, the fact that the local construction, so far as one had been given prior to the last appointment, favors the claim of the relator, is an additional assurance that the conclusion we have reached does no substantial injustice.

But, however impressed with the significance of local construction, we can not rest our decision upon that. We prefer, rather, the other ground. In consonance with history and legislation, and with custom in the state, and by analogy with the rule as to precedence furnished by law for the supreme and circuit courts, the term "senior judge" in this statute means the judge who has served the longest under his present commission.

Judgment of ouster.

SEYMOUR v. RAILWAY COMPANY.

Rule day—Filing demurrer after—Statute of limitations—Question raised by demurrer—Injury to animals by railroads—When action for barred.

1. Where a demurrer is filed to a petition, after rule day for filing the same, and the plaintiff makes no objection thereto, but submits the case to final judgment upon the demurrer, it is too late, on error, to object to such filing.
2. Where the petition on its face shows a cause of action which is barred by the statute of limitations, no legal cause of action is stated, and a demurrer thereto, on the ground that the petition does not state facts sufficient to constitute a cause of action, raises the question of the statute of limitations as well as other defects in the petition, though the better practice undoubtedly is, to specifically state in the demurrer that the cause of action is barred.

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3. An action against a railroad company to recover damages for killing or injuring a domestic animal which had strayed upon its track, and was killed or injured without fault or negligence of the railroad company in operating its train, but solely by the neglect to fence the road as required by law, is founded upon "a liability created by statute, other than a forfeiture or penalty," and is barred in six years.

ERROR to the District Court of Licking county.

The facts are stated in the opinion.

Charles A. Montgomery, for plaintiff in error.

I. The defense of the statute of limitations was not properly interposed. The demurrer, by which the question was attempted to be raised, was filed, without leave, out of rule. It was general in form, and did not specify the statute as a ground of demurrer.

The defense of the statute of limitations is inequitable and not favored. It must be specially relied upon. It is not permitted to be interposed after rule day. *Vose v. Woodford*, 29 Ohio St. 245; *Sheets v. Baldwin*, 12 Ohio, 132; *Wall v. Wall*, 2 Har. & Gill (Md.), 79; *State v. Green*, 4 Gill & Johns. (Md.) 381; *Jackson v. Varick*, 2 Wend. 294; *Beach v. Fulton Bank*, 3 Wend. 574; *Perkins v. Turner*, 1 Har. & McH. (Md.) 400; *Perkins v. Burbank*, 2 Mass. 81; *McKinney v. McKinney*, 8 Ohio St. 423; *Towsley v. Moore*, 30 Ohio St. 195; *Newsom v. Ran*, 18 Ohio, 245, 246.

II. This being an action, brought under the statute, against a railroad company to recover damages for killing an animal by reason of its failure to properly construct and maintain fences and cattle guards along the line of its road, is founded upon "a liability created by statute other than a forfeiture or penalty," and, under section 4981 of the Revised Statutes, is barred in six years.

The act of April 18, 1874 (71 Ohio L. 85), which provides that railroad companies shall be liable for all damages sustained by reason of failure to comply with the requirements of the act with respect to fencing and cattle guards, is not merely a declaratory statute, but remedial in its nature. It

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introduces new obligations, definitely fixes the requirements to be complied with, creates the liability consequent upon the failure to perform these requirements, and provides the remedy by which such liability may be enforced.

The liability created by the statute did not exist at common law. *Kerwaker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172; *Cleveland, C. & C. R. Co. v. Elliott*, 4 Ohio St. 474; *Balt. & Ohio R. Co. v. Wilson*, 31 Ohio St. 555, 560; *Corwin v. New York & Erie R. Co.*, 13 N. Y. 42.

J. Dunbar, for defendant in error.

This is an action for *injuring personal property*, and, under section 4982 of the Revised Statutes, is barred in four years.

No objection was interposed below to the filing of the demurrer out of rule. It is too late to make the objection now.

JOHNSON, J. This is an action brought against the Pittsburgh, Cincinnati and St. Louis Railway Company, under the statute, as amended April 18, 1874 (71 Ohio L. 83), for the recovery of damages for the killing of domestic animals by reason of the want and insufficiency of fence and cattle guards along the line of defendant's railroad.

The defendant demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained and final judgment rendered against the plaintiff. The question before the court below was whether the limitation of *four* or *six* years barred the action; and also, whether the demurrer was the proper way to raise the question.

The plaintiff contends that the only proper way to plead the statute of limitations is by demurrer *specially stating* that the statute is a bar, or by answer.

1. There is another question which does not appear to have been made in the court of common pleas, which is assigned for error here. It is said that this demurrer was filed out of rules and without leave of court, and therefore

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should not be used to raise the question of the statute of limitations, because the plea of such statute is unconscionable, and should not be pleaded after default.

This demurrer was filed November 13, 1879, and was heard October 27, 1881, nearly two years thereafter. No objection was interposed during all this time by the plaintiff, though it appears that the issue presented was on the latter day "argued by counsel," when the demurrer was adjudged well taken and final judgment rendered. Had the point been presented to the court on a motion to strike out the objectionable pleading as being filed out of rules and not with leave, and the court had overruled that motion, error might have been assigned to that ruling if it was erroneous. But no objection was then made, and as the parties argued and submitted the case upon the demurrer, it is too late now to object after final judgment that the demurrer was not filed within rules. The point was not made in the court below, so far as appears by the record, and therefore is not assignable as error.

2. It is claimed that in order that the plaintiff should have the benefit of the statute of limitations he should insist upon it as a bar in his answer or as a *specific* ground of demurrer. *McKinney v. McKinney*, 8 Ohio St. 423, is relied on to support this position. That was an action to recover real property, and for damages for being kept out of possession. The petition was for damages and for nineteen years rent. The defendant answered, without claiming the benefit of the statute in his answer, or by demurrer. In the opinion, Swan, C. J., says: "We have already held, at the present term of this court, that where the petition on its face discloses that the cause of action is barred, the defendant may, by demurrer, specify that the petition shows a cause of action barred by the statute."

The court then holds that as the defendant had answered, denying the allegations of the petition, he could not, on the trial, insist on the bar of the statute, and that in order to avail himself of that defense he should have set it up in his answer or rely on it as specific ground of demurrer.

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The case to which Judge Swan refers as "decided at the same term," is *Sturges v. Burton*, 8 Ohio St. 215. The third syllabus reads: "Where it appears, on the face of the petition, that the cause of action accrued at such a period, that, under the statute of limitations, no action can be brought, the defendant may demur to the petition, on the ground that the petition does not state facts sufficient to constitute a cause of action. But if the objection does not appear on the face of the petition, and the answer does not set up the limitation, it must be deemed waived." In the opinion it is said, "Where the cause of action appears, upon the face of the petition, to be barred, there is, in law, no cause of action alleged; and in analogy with the practice in chancery we see no objection, in such a case, to the defendant interposing a demurrer, under the code. He may either demur in such case, or answer by setting up the bar. If he neither demurs nor sets up the bar in his answer, he waives it."

By a "demurrer under the code" is meant the eighth clause of section 5062 of the Revised Statutes, which authorizes demurrer on the ground that "the petition does not state facts sufficient to constitute a cause of action."

Section 5063 requires that the demurrer shall specify the grounds of objection, and unless it does so, it shall be regarded as objecting only that the petition does not state facts sufficient, or that the court has no jurisdiction.

A demurrer under this eighth clause need not specify the defects of the petition. It is sufficient to follow the words of the statute, though the better practice would be to point out these defects in writing, and not leave them to be specified orally.

Commissioners of Delaware County v. Andrews, 18 Ohio St. 49, 67, is exactly like the case at bar. There the demurrer was on the ground that the petition "does not state facts sufficient to constitute a good cause of action in favor of the plaintiff and against the defendants;" and it was held not error to sustain such a demurrer where the petition

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showed that the right to recovery was barred by the statute. *Keithler v. Foster*, 22 Ohio St. 27.

Vose v. Woodford, 29 Ohio St. 245, was also like the present case, where the demurrer was in the language of the statute, that the petition did not state facts, etc. The syllabus reads, "Since the adoption of the code, as before it, the bar of the statute of limitations must be pleaded, otherwise it is waived. But since the code the bar may be insisted on by demurrer, when it appears upon the face of the pleading demurred to that the time of the statute has run against the cause of action therein stated." This was said of a demurrer like the one before us.

In the opinion it is said, referring to *Sturges v. Burton*, that the bar of the statute may be insisted upon by a demurrer, and that "when the bar of the statute is thus pleaded by a demurrer, it would unquestionably be the better practice to state the ground of demurrer specifically; but, without holding that such specific statement is necessary, it is quite clear that if the statute be not pleaded by answer or demurrer in a proper case, the defense of the statute is to be regarded as waived."

In *Combs v. Watson*, 32 Ohio 228, there was a demurrer, on the ground that the petition did not state facts sufficient to constitute a cause of action. It was held sufficient as a plea of the statute of limitations. Other cases might be cited, but these are deemed sufficient.

3. As this petition on its face showed that the cause of action accrued more than four years and less than six years before the commencement of the action, the question is fairly presented whether the court below erred in holding that it was barred by the four years limitation. We think it did err.

Subdivision 3, Chap. 2, Div. 2, Tit. I, Part Third, of the Revised Statutes, relates to civil actions other than for the recovery of real property. Section 4981 of the Revised Statutes limits actions upon contract not in writing, ex-

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press or implied, and actions upon a "*liability created by statute*, other than a forfeiture or penalty," to six years.

Section 4982 limits actions of trespass, the recovery of personal property, the injury to the same, or to the rights of plaintiff, not arising on contract, etc., to four years from the time the right of action accrues.

This section relates to actions *ex delicto* and for frauds, as distinguished from actions *ex contractu*. All causes of action for wrongful act, neglect, or default, not otherwise provided for, are barred in four years; while under section 4981, all causes of action arising on verbal contracts, express or implied, and all causes of action where the liability is created by statute, are barred in six years.

This is a liability created by statute. Without the statute such an action could not be maintained.

Section 4981 relates to two classes of obligations. 1. Contracts not in writing, express or implied. 2. Liabilities created by statute other than a forfeiture or penalty.

Section 4982 relates to what was formerly known as actions *ex delicto*, and to actions on the ground of fraud.

This is not an action for injuring personal property arising by reason of the wrongful act, neglect, or default of defendant, nor is it an action for the injury to the rights of the plaintiff by reason of such wrongful act, neglect, or default.

The petition alleges as a ground of recovery the killing of a domestic animal, by reason solely of defendant's omission to construct and keep in good repair good and sufficient fences and cattle guards to turn stock along the line of its road by reason of which neglect and omission the plaintiff's mare without his fault was run over and killed. The statute (71 Ohio. L. 85) provides that in case of such failure and neglect, every railroad "shall be liable for all damages sustained in person or property in any manner, by reason of the want or insufficiency of any such fence, crossing, or cattle guard, or any carelessness or neglect of

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said company, their agent or agents in constructing and keeping the same in repair," etc.

This is a liability created by statute. Without such a statute the company was not bound to fence its road, nor was it liable for a mere failure to fence. By the common law it is liable for wrongfully or negligently managing its trains so as to cause injury to person or property, and for such injury the action is barred in four years. As the petition does not charge any common law liability, that limitation can not be applied to this case. These two sections must be construed together, so as to give each force. If we should say that this cause of action came under 4982, we would be compelled to hold that it was not a liability created by statute, or that both four and six years applied to it, but by holding as we do that section 4982 applies to injuries and wrongs to person or property other than those to perform a statutory duty, we give force and effect to both sections. This statute requiring railroads to be fenced, and making them liable for damages to personal property by reason of such failure, creates a statutory liability which is barred in six years. While section 4982 is given full force by limiting it to common law liabilities for wrongful act, neglect, or default, such a construction harmonizes and gives full force to both sections.

Judgment reversed.

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Life insurance policy—Construction—Untrue answers in application—Policy void ab initio—When premium may be recovered back.

1. The provisions of a life insurance policy are construed and applied like the terms of any other contract, and such provisions may render the policy void, *ab initio*, by the terms of the same and the failure of warranty.
2. When a life policy is issued and accepted upon the expressed condition that the answers and statements of the application are warranted true

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in all respects, and that if the policy be obtained by any untrue answer or statement, or by any fraud, misrepresentation, or concealment, "the policy shall be absolutely null and void;" and, as to matters material to the risk, some of the answers and statements are untrue in fact, though made without actual fraud and under an innocent misapprehension of the purport of the questions and answers, no contract of insurance is thereby made, and the policy does not attach, but it is void *ab initio*.

3. When, for such a policy, premium has been paid by the applicant to the insurance company, such payment may be recovered back.

ERROR to the District Court of Ross county.

August 1, 1878, Jeremiah Pyle brought suit against the Connecticut Mutual Life Insurance Company, to recover back the premium paid for a policy that the company had canceled.

Pyle, in his petition, says:

That, on August 21, 1872, the defendant, by its agent, one John A. Nipgen, duly authorized to take applications for life insurance in the company of defendant, and to receive the cash premium thereon, applied to plaintiff at his home, "Pyle Farm," in Ross county, and requested him to take a policy of insurance in defendant's company upon the life of plaintiff. At first, plaintiff refused to do so on account of having no money, when Nipgen offered to advance to or loan plaintiff the money to make the first payment on the policy, to which proposition plaintiff acceded, and then told Nipgen that he, plaintiff, had failed in getting a policy of insurance, in June, 1871, in the Charter Oak Insurance Company, of which Mr. Schutte was agent, on account of something being the matter with his pulse. Nipgen then asked plaintiff if the application had been sent to the company. Plaintiff replied that it had not as he knew of. To which Nipgen responded, that if it had not gone any farther than that it did not make any difference; and, thereupon, plaintiff agreed with defendant, acting by its agent, to make application for a policy of insurance upon his life in defendant's company for the sum of ten thousand dollars, the same to be paid at the office of

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defendant, in Hartford, Connecticut, to Ede Pyle, wife of plaintiff, if she survived him—if not, to the children of plaintiff, or their legal representatives, etc. The said Nipgen, having a blank application, then commenced asking plaintiff the questions required to be asked of an applicant by the “statement of particulars respecting the person whose life is proposed for insurance, and which statement forms a part of the contract of insurance,” and which are the same questions attached to the policy afterward issued by defendant, and plaintiff answered them until Nipgen came to the question, “Has any company ever declined to grant insurance on your life?” when he, said Nipgen, said he would just answer that question “No.” Plaintiff told him “it was something he knew nothing about; that he could do just as he pleased about that.” Said Nipgen thereupon put down, in answer to the question, “no.” Plaintiff and Nipgen, on the same day, went to Hallsville, to Doctor Gildersleeve, who, owing to the absence of the regular examining physician of the defendant, examined plaintiff, and thereupon Nipgen told Gildersleeve to answer all the medical questions “no,” meaning the “Questions to be answered by the medical examiner of the Connecticut Mutual Life Insurance Company,” and they were so answered. Plaintiff then signed said application for his wife and himself as required, and executed his note, payable to the order of Nipgen at the First National Bank of Chillicothe, Ohio, four months and ten days after date, for the sum of \$219.20, with interest, being the amount of “cash premium” required to be paid, and which note, having been indorsed by Nipgen, plaintiff, afterward, at maturity, paid. The application was sent to the company, and a policy, No. 119,633, of date August 31, 1872, in said amount, on plaintiff’s life, issued, and shortly afterward delivered to plaintiff. Upon reading the policy, about a month afterward, plaintiff found it contained, among others, the following conditions and agreements:

“This policy is issued and accepted upon the following express conditions and agreements:

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"1. That the answers, statements, representations, and declarations, contained in or indorsed upon this application for this insurance—which application is hereby referred to and made part of this contract—are warranted by the insured to be true in all respects; and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, that this policy shall be absolutely null and void. . . .

"4. That in every case in which this policy shall cease and determine, or shall become null and void, all premiums paid in respect of the same shall be forfeited to the company."

At the foot of the application, and a part thereof, is the following :

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations, or concealment of facts, then any policy granted upon this application shall be null and void; and all payments made thereon shall be forfeited to the company."

Plaintiff then called on Nipgen, and, referring him to the terms of the policy, told him that he thought it was of no account, owing to the answer, "no," to the question whether any company had ever declined to grant insurance on his life. He said the plaintiff should bring the policy in and get it corrected, and that he would write to the company about it.

Plaintiff took the policy to Nipgen, and Nipgen wrote to the company, stating that said question should have been answered "yes," instead of "no," and stated how far the Charter Oak matter had gone in plaintiff's case. Plaintiff signed the letter, and Nipgen mailed it. About three or four weeks afterward, plaintiff inquired of Nipgen about the matter, and was told that the company had said that plaintiff had better go before Doctor Searce, and be re-

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examined. About a week after, plaintiff did so, and was asked about his heart, and answered that it bothered him sometimes; that, after working hard, he got weak and nervous sometimes; that he took whisky and ginger for it. Plaintiff left, and they made out the application. Plaintiff called on Nipgen repeatedly about the matter, and he claimed that he had not yet heard from the company; then, about two months after that, Nipgen claimed the application, meaning the new or corrected one, had been mislaid in the Cincinnati office of defendant. Then Nipgen and Searce made out another application, and sent it on. This was the third application, and was made without the knowledge of plaintiff. When plaintiff again called on Nipgen, he was informed by him that the company had declined his application.

There were attempts to get a new or corrected policy in place of the original one.

On August 1, 1873, or thereabouts, plaintiff informed Nipgen that he was ready to make payment whenever he, Nipgen, would get it fixed. The defendant, upon receiving the third application, and without the knowledge or consent of plaintiff, canceled and annulled said policy of August 31, 1872. This was, as plaintiff thinks, at or about the expiration of one year from the time it was issued. Upon being informed of said cancellation of said policy, some time in September, 1873, the precise time not now remembered, plaintiff demanded from said agent and said company, the re-payment of his money so paid as premium, which was refused.

Wherefore plaintiff prays judgment against said defendant for said sum of \$219.20, with interest thereon, from August 31, 1872; or, if the court shall be of opinion that an action to recover back the money paid is not the proper action, then that the plaintiff may recover from the defendant the sum of \$500, his damages herein sustained; or that defendant, upon being paid the back premiums on said policy, may be ordered to rescind the cancellation and annulling of said policy, and to correct the same as to said

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answer mentioned, according to the fact, and for other proper relief.

A demurrer to this petition was overruled, and the insurance company answered, denying that plaintiff "told said Nipgen that he, plaintiff, had failed in getting a policy of insurance in June, 1871, in the Charter Oak Insurance Company, of which Mr. Schutte was agent, on account of something being the matter with his pulse;" that "Nipgen then asked plaintiff if the application had been sent to the company;" that "plaintiff replied that it had not as he knew of, to which Nipgen responded that if it had not gone farther than that, it did not make any difference," and says that no such conversation took place between the plaintiff and Nipgen; also, the company denied other specific allegations, but it did not deny that its agent, Nipgen, wrote the application. To this answer plaintiff replied, denying some specific allegations of the answer. On the trial, by request of defendant, the court found, as its conclusions of fact, that in addition to the facts admitted by the pleadings, that several of the answers to questions contained in the application of the plaintiff, on which the policy of insurance was issued, were erroneously answered, which answers were by the terms of the policy made warranties, but the court further finds that all of said questions so erroneously answered by the plaintiff, were so answered under an innocent misapprehension of the purport of the questions and the answers, and the answers that should have been made thereto, and without any intent to perpetrate a fraud of any kind upon the defendant. The court further finds that the untruth of several of said answers was upon questions material to the risk, and that by the terms of said policy and the application which became and was a part thereof, the untruth of said answers constituted breaches of the warranties in respect thereof contained in said policy, and that by its terms the breach of said warranties was to make said policy null and void.

The court finds as conclusions of law, that the plaintiff is not entitled to have the cancellation of said policy of

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insurance set aside, nor to have the same reformed in any particular, and that the same is wholly void, and of no effect whatever, and was so from the moment it was issued.

The court further finds as a conclusion of law, that the plaintiff is entitled to recover of the defendant the sum of \$219.20, the premium paid, with interest from the 21st day of August, 1872, to which the defendant, by counsel, excepted.

A motion for a new trial was overruled, and the ruling excepted to, and judgment was entered for Pyle.

The district court affirmed this judgment, and plaintiff in error now seeks to reverse these judgments.

Lawrence T. Neal, for plaintiff in error.

This is not a case in which the rule that the premium must be returned where the risk has not attached or commenced to run, can be applied. Upon the filing of the application, the payment of the premium, and the issuing of the policy, the contract between the parties was complete, and the risk then attached. This was not prevented by the declarations in the application and policy that fair and true answers should be given to the questions in the application, and that any untrue or evasive statements, or any misrepresentation or concealment of facts, should nullify the policy. These provisions were inserted for the benefit of the company. The policy was not void, but simply voidable at the option of the company.

The company might have waived the provisions which authorized it to declare the policy void upon the terms and conditions named therein, and, in that event, the risk, which did run for one year, would have continued to run. *Insurance Company v. Norton*, 96 U. S. 234.

The premium was, therefore, rightfully retained by the company when it elected to annul the policy, the rule being that if the risk once attaches the premium can not be returned. *Bliss Life Ins.*, sec. 423; *Fulton v. Lancaster*, *Ohio Ins. Co.*, 7 Ohio (2 pt.), 5.

The rights of the parties are to be determined by the

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contract between them, and by the express terms of this contract the premium was to be forfeited to the company if there should be in any of the answers of Pyle "any untrue or evasive statement, or any misrepresentations or concealment of facts." The terms of this agreement can not be altered or varied by interpolating new words, or by giving to the words used by the parties other than their ordinary meaning. It has been repeatedly held, in like cases, that the premium can not be recovered. Bliss Life Ins., §§ 37, 63; Ellis Fire and Life Ins. 260; Angell Fire and Life Ins., § 402; *Byers v. Insurance Company*, 35 Ohio St. 606; *Anderson v. Fitzgerald*, 4 Ho. Lords Cas. 484; s. c., 24 Eng. Law and Eq. 1; *Miles v. Connecticut Mut. Life Ins. Co.*, 3 Gray, 580, 582; *Duckett v. Williams*, 2 Crompt. & Mees. 348; s. c., 4 Tyrwh. 240; *Day v. Mutual Ben. Life Ins. Co.*, 1 McArthur, 41; s. c., 29 Am. Rep. 565; *Low v. Union Cen. Life Ins. Co.*, 6 Cin. Law Bull. 666.

The only ground upon which the premium can be recovered by the insured in any case where the policy is void *ab initio*, is that there is no consideration for its payment in the first instance. But there was a consideration. The responsibility assumed by the company, the risk and inconvenience to which it was exposed, and the expense incurred in commissions to its agents, and otherwise, constituted a sufficient consideration. *Lewis v. Phœnix Mut. Life Ins. Co.*, 39 Conn. 100.

The insured can in no case recover the premium if there has been any fraud upon his part. May on Insurance, § 567; Angell Fire and Life Ins., § 400; Bliss Life Ins. § 423; Ellis Fire and Life Ins. 141.

The misrepresentations made by Pyle, whether made purposely or unintentionally, should be treated as fraudulent. Bliss Life Ins., § 36; 1 Story Eq. Jur., § 193; *Friesmuth v. Agawam Mut. Fire Ins. Co.*, 10 Cush. 587.

Clark & McDougal, for defendant in error.

Whatever questions were erroneously answered were so answered by the agent of the company—at his dictation,

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and by him written in the application—after having been fully advised by Pyle of all the circumstances. Such wrong should be imputed to the company, and not to the insured. *Insurance Company v. Williams*, 39 Ohio St. 584, 588; *Massachusetts Life Ins. Co. v. Eshelman*, 30 Ohio St. 647, 656.

The answers of the insured as to the condition of his health are made warranties by the terms of the policy. Such warranties are, however, in the nature of conditions precedent. *O'Neil v. Buffalo Fire Ins. Co.*, 3 N. Y. 122; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136.

A contract made upon a condition precedent can only become a valid contract upon the existence of the condition according to the terms agreed upon by the parties. The answers being in certain particulars untrue—incorrect—and the truth of these answers being made warranties by the terms of the policy, the policy itself never took effect as a contract of insurance. Pyle was at no time insured, for the company was at no time bound by the policy; and the questions having been answered under an innocent mistake as to their import, and without any intention to deceive, the premium should be returned. 3 Kent's Com. *341, *342; *Steinback v. Rhinelanders*, 3 John. Cas. 274, 275; *Tyrie v. Fletcher*, Cowp. 666; Marshall on Insurance, 549; *Delavigne v. United Ins. Co.*, 1 John. Cas. 310; s. c., 1 N. Y. Com. Law Rep. 335.

A policy of insurance is a contract to be governed by the same principles which govern other contracts. May on Ins., §§ 172, 173; *Cornfoot v. Fowke*, 6 Mess. & Wels. 368; *Turley v. North Am. Fire Ins. Co.*, 25 Wend. 374, 377.

When the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned. May on Ins., § 4; *Stevenson v. Snow*, 3 Burr. 1237; *Tyrie v. Fletcher*, Cowp. 668; Pothier du Cont. d'Ass. 4; Pardessus, Droit Commercial, 596, 3; 2 Marsh. Ins. 663.

If a policy be void *ab initio*, or if the risk never attaches, and there is no fraud on the part of the insured, and the

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contract is not against law or good morals, he may recover back all the premiums he may have paid. May on Ins., § 562; *Clark v. Man. Ins. Co.*, 2 Woodb. & Minot, 472; *Mutual Ass. Co. v. Mahon*, 5 Call. (Va.) 517; *Fowler v. Scottish Eq. Life Ins. Co.*, 28 L. J. Ch. 225; *Rochester Ins. Co. v. Martin*, 13 Minn. 59; *Foster v. U. S. Ins. Co.*, 11 Pick. 85.

Where a policy is avoided by concealment or misrepresentation, *not fraudulent*, the assured is entitled to a return of premium. *Anderson v. Thornton*, 8 Wels. H. & G. 425; *Watertown Fire Ins. Co. v. Grehan*, 72 Ga.

To sustain the claim of forfeiture would be against the policy of our law. See act of May 15, 1878, 75 Ohio L. 376; act of April 2, 1873, § 3; 70 Ohio L. 99.

FOLLETT, J. In filling up the application for this policy, Nipgen was the agent of the insurance company, and was not the agent of Pyle. *Insurance Co. v. Williams*, 39 Ohio St. 584. And though the application was thus made, the policy was canceled for its untrue statements innocently made on the part of Pyle.

The application and the policy together form the contract. The terms of the contract are plain and free from doubt or ambiguity. It is agreed in the application, "that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void."

And the policy provides that "this policy is issued and accepted upon the following express conditions and agreements: 1. That the answers, statements, representations, and declarations, contained in, or indorsed upon this application for this insurance—which application is hereby referred to, and made part of this contract—are warranted by the insured to be true in all respects; and that if this policy has been obtained by or through any fraud, misrepresentation or concealment, that this policy shall be absolutely null and void."

I. Did the policy ever attach, or was it ever valid?

The court finds as conclusions of fact, that "several of the answers to questions contained in the application of the plaintiff, on which the policy of insurance was issued, were erroneously answered;" and the "court further finds that the untruth of several of said answers was upon questions material to the risk, and that, by the terms of said policy and the application which became and was a part thereof, the untruth of said answers constituted breaches of the warranties in respect thereof contained in said policy, and that *by its terms* the breach of said warranties was to make said policy null and void."

And the court finds as a conclusion of law, that the policy "is wholly void, and of no effect whatever, and was so from the moment it was issued."

But the plaintiff in error insists that the policy took effect and was in force until it was canceled. To sustain such a claim would ignore the expressed terms of both the application and the policy, as well as the *cause* of the cancellation of the policy. These *terms* the plaintiff in error has never waived, but it has insisted upon them and acted upon the strict letter of the agreement, and has canceled the policy.

This is not a new question in the courts. In the case of *Clark v. Manufacturer's Ins. Co.*, 2 Woodb. & M. 472, the court held: "A warranty is generally a stipulation made and described in the policy itself, and must be complied with, whether material or not." "Where a material fact is suppressed in such representations, the insurance is avoided, and the policy does not attach, whether the suppression happens by neglect or fraud." In *Friesmuth v. Agawam Mutual Fire Ins. Co.*, 10 Cush. 587, "the application contained an untrue representation that the property was unincumbered," and the court held, "that the policy was wholly void." In *Foot v. The Aetna Life Ins. Co.*, 61 N. Y. 571, the court held: "If a policy of insurance declare that the statements made in the application shall be

part and parcel of the policy, such statements become warranties, and must be true, whether material or not."

"A contract of insurance, like other contracts, is avoided by an untrue statement by either party as to a matter vital to the agreement, though there be no intentional fraud in the misrepresentation." *The Co-operative Life Ass'n of Miss. v. Leflore*, 53 Miss. 1.

On a similar contract the supreme court of the United States, in *Jeffries v. Life Ins. Co.*, 22 Wall. 47, held: "Any answer untrue in fact, and known by the applicant for insurance to be so, avoids the policy, irrespective of the question of the materiality of the answer given, to the risk." And in the opinion, Mr. Justice Hunt says: "Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company." And this is approved in the case of *Ætna Life Ins. Co. v. France*, 91 U. S. 510, and there the court also held, "that the company was not liable if the statements made by the insured were not true. The agreement of the parties that the statements were absolutely true, and that their falsity in any respect should void the policy, removes the question of their materiality from the consideration of the court or jury."

This court, in *Union Mutual Life Ins. Co. v. McMillen*, 24 Ohio St. 67, held: "Where a life policy is made and accepted, upon the expressed condition that if the annual premium is not fully paid within the time specified, the policy 'shall be null and void, and wholly forfeited,' the failure to pay the premium avoids the policy;" and that was where the policy had attached. But in such a case, in *Union Central Life Insurance Co. v. Bernard*, 33 Ohio St. 459, the court held, where "the uniform custom of the insurance company has been to give notice of the time when the premiums fall due, and to collect the same at the residence of the policy-holder, through a local agent residing in his neighborhood, good faith requires that this mode of

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collection should not be discontinued, and payment required at the company's office, without notice to the insured."

There are mistakes in policies that may be disregarded or corrected and the policy enforced. See *Harris v. Columbiana County Mutual Ins. Co.*, 18 Ohio, 116, and *Insurance Co. v. Williams*, *supra*. But in this case the court did not err in holding the policy "is wholly void and of no effect whatever, and was so from the moment it was issued."

II. Should the premium be returned?

The court finds as a conclusion of law that Pyle is entitled to recover of the insurance company the premium paid, with proper interest. The court thus held, not only because the policy was void *ab initio*, but because it also found "that all of said questions so erroneously answered were answered by the plaintiff under an *innocent misapprehension* of the purport of the questions and the answers, and the answers that should have been made thereto, and without any intent to perpetrate a fraud of any kind upon the defendant."

There was no actual fraud, at least on the part of Pyle. On this policy, no risk ever attached.

In 1777, in the case of *Tyrie v. Fletcher*, Cowp. 666, 668, Lord Mansfield stated the general rule to be, "that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it."

In 1800, in the case of *Delavigne v. United Ins. Co.*, 1 Johns. Cas. 310, the court held, "where a policy becomes void by a failure of the warranty, the insured is entitled to a return of the premium, if there be no actual fraud."

"Where a policy is avoided by concealment or by misrepresentation not fraudulent, the assured is entitled to a

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return of the premium, and the policy is conclusive evidence of the receipt of the premium by the insurer." *Anderson v. Thornton*, 8 Exch: 425.

And such is now the general rule. See 3 Kent, *341, and May on Ins. § 4.

The rule is different where the risk has attached or there is actual fraud.

Yet it is urged here that "we must leave the premium paid by the insured to be disposed of according to the terms of his contract with the insurer." No such terms exist. There is no *contract* between Pyle as the "insured" and the company as the "insurer." Under this policy Pyle never was *insured*, and the company never was an *insurer* of Pyle. The policy has always been void, and this claim, based on the contract, is as void as the policy. From all that appears Pyle was not in fault, and the agent should not have obtained the premium, and the insurance company should not retain Pyle's money.

Of course, we have not considered how far the provisions of such a policy may be waived by the acts of the parties, nor to what extent such parties may be bound by their subsequent acts, and in connection with such provisions, and what was done in procuring such application and policy. The court did not err.

Judgment affirmed.

ARCADE HOTEL Co. v. WIATT.

Innkeeper—Liability for loss of money by person not guest—Who is guest.

1. An innkeeper is not liable, as such, for the loss of money deposited with him for safe keeping by a person who is not a guest of the inn at the time such deposit is made, or at the time the loss occurs.
2. The clerk of such innkeeper has no authority to bind the latter, either as innkeeper or special bailee, for the loss of money deposited for safe keeping with such clerk by a person who is not a guest of the inn at the time of such deposit.

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3. To entitle a person visiting an inn to be treated as a guest, and to hold the innkeeper responsible for money deposited with him for safe keeping, it must appear that such visit was for the purposes which the common law recognizes as the purposes for which inns are kept; and where such visit is made by one who does not require the present entertainment or accommodations of such inn, but whose purpose is simply to deposit his money for safe keeping, he is not a guest of the inn and can not hold the proprietor to an innkeeper's liability for the loss of his money.
 4. W., the keeper of a gambling house, closed his night's business at two o'clock A. M., having a sum of money upon his person; and not being ready to retire for the night, and not wishing to carry his money upon his person at that time of the night, visited an inn for the purpose of depositing his money for safe keeping; found the inn in charge of a night clerk; inquired if he could have lodgings for the night; was told that he could; stated that he did not desire to go to his room at that time, but wished to leave some money with the clerk, and would return in about half an hour. The clerk told him he would reserve a good room for him. He did not register his name. It was not upon any book of the inn. No room was assigned him. He left his package of money with the clerk, received a check for it, and departed. He returned in about three hours to have a room assigned him and retire for the balance of the morning. The clerk had absconded with the money.
- Held*, W. was not a guest of the inn at the time he deposited his money with the clerk, and the innkeeper is not liable for its loss.

ERROR to the District Court of Hamilton county.

The action below was brought by the defendant in error, Edward Wiatt, in the superior court of Cincinnati, against the plaintiff in error, a corporation, operating the Hotel Emery, at Cincinnati, to recover the sum of twenty-one hundred and ninety-five dollars which he alleged he deposited with the company on the 14th of October, 1882, while a guest at the hotel, for safe keeping in its safe, and which it refused to return or repay to him.

The defendant below denied that Wiatt was a guest of the hotel, and that he deposited, or it received, any money from him for safe-keeping.

The cause was tried to the court, a jury being waived, and the plaintiff below recovered judgment for the amount claimed.

The district court affirmed this judgment on error, and the present proceeding is to reverse the judgments below. All the evidence given upon the trial is before the court in a bill of exceptions.

The questions considered by the court are, (1) whether there was error in the admission of certain testimony relating to the amount of money involved in the loss of the defendant in error; and (2) whether Wiatt was a guest of the hotel at the time of the alleged deposit.

So far as the evidence upon this issue is reviewed by the court, it is presented in the opinion.

The former question is presented by the action of the court, as shown by the following extract from the bill of exceptions. (Robert Holloway, called for the plaintiff below, was asked in chief):

“Q. Do you know Mr. Wiatt? A. Yes, sir.

Q. Is he in business with you? A. He was.

Q. Do you know how much money was in his card playing house on the morning of the 14th or night of the 13th of October? A. No, sir; I know what he ought to have had.

Q. You know what he ought to have had?

Mr. Jenney—I object to it.

The Court—Explain what you mean by that. The question as asked is open to objection.

(Former question repeated.)

Mr. Jenney—I object to it.

The Court—The objection is overruled.

Mr. Jenney—I will take an exception.

A. Well, he was responsible for twenty-five hundred dollars; I do not know whether he had that or one hundred dollars; he was supposed to have had twenty-five hundred dollars in his possession.”

Perry & Jenney, for plaintiff in error.

Wiatt was not a guest of the hotel. Hence the clerk, by receiving a package from him for safe keeping, received

it as an individual, and not as agent of the hotel, and it is not bound by his act.

An innkeeper, at common law, is liable for the loss of goods of his guests committed to his care unless the loss is caused by the act of God, by the common enemy, or by the neglect or default of the guest.

The grounds of so stringent a law are clear. The wayfarer is compelled to lodge at the inn; he has no choice, and he is a stranger. He has no knowledge of the innkeeper's respectability, who, for all he knows, is in league with thieves. *Monc. Inn. 1.*

"In order to create the liability in question, the relation of guest and innkeeper must exist." *Id. 13.*

"Inns are for passengers and wayfaring men." *Wharton Innkeepers, 75, 76.*

"Common inns are instituted for passengers and wayfaring men." *Calve's case, 8 Coke, 32.*

An innkeeper is "a person who makes it his business to entertain travelers and passengers," etc. *Bac. Abr. Inns and Innkeepers, B. C. 1.*

"By opening a common inn the hostler undertakes to receive and entertain all travelers until his house is filled." *Willc. Inns, 47.*

"Any one who makes it his business to entertain travelers, and provide lodging and necessaries for them, their horses and attendants, is a common innkeeper." *Edw. Bailm., § 450.*

An inn is "a house where a traveler is furnished with every thing he has occasion for while on his way." *Thompson v. Lacy, 3 B. & Ald. 283; Bouv. L. Dict.; 2 Par. Cont. 145.*

For further definitions of an inn, see 1 Chitty Cont. (11 Am. ed.), 674; *Ingalsbee v. Wood, 36 Barb. 462; Jacob's Law Dict.; Burr. Law Dict.; Worcester Dict.; Story Bailm., § 464.*

As to what constitutes a guest, see *Tidswell Innkeepers Leg. Guide, 1; Story Bailm., § 477; Webst. Dict.; Rex v. Luellen, 12 Mod. 445; Queen v. Rymer, L. R. 2 Q.*

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B. Div. 136; *Walling v. Potter*, 35 Conn. 183; *Grinnell v. Cook*, 3 Hill, 485; *Atkinson v. Sellers*, 5 C. B. N. S. 442; *Eslava v. State*, 49 Ala. 355; *Gholson v. State*, 53 Ala. 519; *Carter v. Hobbs*, 12 Mich. 52; *Gelley v. Clerk*, Cro. Jac. 188; *Healy v. Gray*, 68 Mass. 489; *Lusk v. Belote*, 22 Minn. 468; *Curtis v. Murphy*, 31 Alb. L. J. 352.

There are authorities to the effect that when a traveler leaves his horses at an inn and lodges elsewhere, or when one purchases liquor, etc., at the bar of the hotel, he thereby becomes a guest. The reason for such holding is that, by the keeping of the horses or sale of the liquor, etc., the landlord derives a profit, but it does not apply where he leaves a dead thing from which the landlord derives no profit. *Wharton Innkeepers*, 76; *Williams v. Gesse*, 3 Bing. N. C. 849; *Lynar v. Mossop*, 36 Q. B. Up. Can. 230.

Judged by the foregoing authorities, Wiatt was not a guest of the hotel, nor did the Arcade Hotel Company occupy toward him the position of an innkeeper; nor did it derive any benefit from the leaving of the package with the clerk. He was neither a traveler, a wayfarer, nor a stranger, and the reason for the strict liability imposed upon innkeepers does not apply to him. He was not "compelled to lodge at the inn;" he had his house, to which he could have gone. He had a "choice" among the many hotels and lodging houses of the city. He was not "a stranger in the neighborhood," who "has no knowledge of the innkeeper's respectability." He did not use the hotel for any of the purposes for which hotels are established, but used it simply as a place of deposit for his money, not wanting to carry it on his person at "that time of the night."

Campbell, Bates & Bettman, for defendant in error.

Whether the relation of innkeeper and guest subsists is purely a question of fact and not of law, and if found for the plaintiff, will not be reversed. *Hall v. Pike*, 100 Mass. 495; *Houser v. Tully*, 62 Pa. St. 92; *McDonald v. Edger-*

ton, 5 Barb. 560; *Jalie v. Cardinal*, 35 Wis. 118; *Pinkerton v. Woodward*, 33 Cal. 557, 598.

Whatever the reason of the liability of innkeepers, the courts say of it: "The rule is severe, but not unjust." *Wilkins v. Earle*, 44 N. Y. 171, 178. "The rule of public policy does not admit of any just relaxation." *Id.* 179.

"We are not disposed to relax the rules of liability applicable to innkeepers." *Fuller v. Coats*, 18 Ohio St. 343, 350.

Our opponents have made a most industrious and interesting collection of *dicta*, but no decisions, to the effect that an inn is for the entertainment of travelers, and that only a stranger *en route* can become a guest.

An inn is defined to be "a public house of entertainment for all who choose to visit it." *Wintermute v. Clarke*, 5 Sandf. (N. Y.) 242, 247; *Walling v. Potter*, 35 Conn. 182; *People v. Jones*, 54 Barb. 311, 317; *Pinkerton v. Woodward*, 33 Cal. 557; 1 Wait Ac. and Def. 343; Bouv. Inst., § 1015; Redf. Bailm., § 584; Edw. Bailm., § 455; Schouler Bailm. 256.

"An innkeeper is bound to receive and entertain all applicants," etc. *Watson v. Cross*, 2 Duv. (Ky.) 147; *Hawthorn v. Hammond*, 1 Car. & Kir. 404, 407.

In fact, the common averment was that defendant kept an inn for the accommodation of travelers, and others. See *Allen v. Smith*, 12 Com. Bench. (N. S.) 638.

Calye's case, 8 Coke, 32, as well as *Southcote v. Stanley*, 1 Hurl. & Nor. 247, turned on the fact that the inmate was invited there by the innkeeper.

Calye's case has not been understood to exclude a resident from becoming a guest. *Warbrook v. Griffin*, 2 Brown. & Gold. 254; *Bennet v. Mellor*, 5 Term (Durnf. & E.) 278.

A resident may become a guest of an inn. *Walling v. Potter*, 35 Conn. 183; s. c. 9 Am. Law Reg. N. S. 618, 620, note by Judge Redfield; *Thompson v. Lacy*, 3 Barn. & Ald. 283; *Hall v. Pike*, 100 Mass. 495; *Peaché v. Colman*, L. R. 1 C. P. 324, 328; *Watson v. Cross*, 2 Duv. (Ky.)

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147; *Kopper v. Willis*, 9 Daly, 460; *Drope v. Thairye*, Noy, 79.

The cases are numerous where persons obviously living near by were held guests, thus: A driver of cattle along the road, in *Hilton v. Adams*, 71 Me. 19. One who came with a horse and wagon to attend a trial of a case brought against him by the innkeeper, in *Read v. Amidon*, 41 Vt. 15. One who came to market, in *Bennett v. Mellor*, 5 Term R. 273. So, if it does not appear that the party was a traveler, in *Farnworth v. Packwood*, 1 Stark. 198; *McDonald v. Edgerton*, 5 Barb. 560; *Parker v. Flint*, 12 Mod. 254; *Hancock v. Rand*, 94 N. Y. 1.

In the following cases the residence of the plaintiff would have been a conspicuous element in the decision, had the law been as claimed by our opponents: *Ingallsbee v. Wood*, 32 N. Y. 577; *Gastenhofer v. Clair*, 10 Daly, 265; *Norcross v. Norcross*, 53 Me. 163; *Grinnell v. Cook*, 3 Hill, 485; *Hickman v. Thomas*, 16 Ala. 666; *Thickstun v. Howard*, 8 Blackf. 535; *Queen v. Rymer*, L. R. 2 Q. B. Div. 136; *Shoe-craft v. Bailey*, 25 Iowa, 553; *Whittemore v. Haroldson*, 2 Lea (Tenn.) 312.

The testimony to show how much money Wiatt ought to have had was properly admitted. *Wilkins v. Earle*, 44 N. Y. 172; *Mad River, etc., R. Co. v. Fulton*, 20 Ohio, 318, 326.

Even if the evidence was not competent, it would fall within the rule of *Thayer v. Luce*, 22 Ohio St. 62.

Perry & Jenney, in reply, commented upon the cases cited by counsel for defendant in error.

We claim that "who are innkeepers, and what are their duties, must be determined by the common law," Walker's Am. Law (6th ed.) 490; and "a jury may properly decide, under judicial instruction, whether one is an innkeeper or not, upon all the proof submitted," Schouler Bailm. 254. And the same rule applies in determining who are guests.

The numerous definitions given in the books and decia-

ions of who is an innkeeper or a guest show that the *status* of a party is a question for the court.

OWEN, J. 1. Did the trial court err in admitting, against the objection of the defendant, the statement of the witness Holloway?

The amount of money deposited by the plaintiff below was in controversy. The testimony objected to was material. It appears from the opinion of the trial judge, to which we are referred by counsel, that it exercised important effect in the determination of the case.

The witness was asked if he knew how much money Wiatt had in his card-playing house on the morning of the 14th or night of the 13th of October. He answered: "No, sir; I know what he ought to have had." Counsel then inquired, "You know what he ought to have had?" This was objected to. The question and objection were repeated. The objection was overruled, and exception taken. The answer was: "Well, he was responsible for twenty-five hundred dollars; I do not know whether he had that or one hundred dollars; he was supposed to have had twenty-five hundred dollars in his possession."

It seems too clear for serious discussion that this was erroneously admitted and considered. The statements made by the plaintiff below concerning the amount of money contained in the package deposited were involved in much doubt and uncertainty. Holloway was his only corroborating witness. The statement objected to could have had but one effect—to prejudice the defendant below. For this error alone we should feel called upon to reverse the judgment below. We do not, however, place our action wholly upon this ground.

2. Was Wiatt a guest of the hotel at the time he delivered to the clerk the package containing the money involved in suit? This is the vital issue in the case. That the money was deposited and lost is assumed. It is maintained by defendant in error that this was a question of

fact, and that the judgment of the trial court upon the evidence is conclusive.

Conceding that there was substantial conflict in the evidence upon this issue, the position of counsel is well chosen. If, however, the facts are definitely ascertainable from the undisputed evidence, whether Wiatt was a guest of the hotel is a question of law. We do not undertake to weigh conflicting proof. If there was evidence fairly tending to prove Wiatt a guest of the hotel at the time he deposited his money with the clerk, the judgment below is, upon that issue, conclusive. If, however, the evidence offered upon this issue, construed most favorably to the plaintiff below, does not fairly tend to establish that relation, it is our duty to say, as a legal conclusion, that the judgment below is erroneous.

The arguments of counsel, aside from the alleged error in admitting the statements of Holloway, and whether Wiatt was a guest, are chiefly addressed to the question whether Wiatt, being a resident and householder of the city of Cincinnati at the time he left his money with the clerk of the hotel, and not in any sense a traveler, was capable of becoming a guest of the hotel, and of charging its proprietor with the safe keeping of his money. Without entering upon the consideration of this question, we are content to assume, without deciding, that Wiatt was so capable of becoming a guest, and to proceed with the consideration of the proof which is relied upon to establish such relation.

It must be conceded that unless the relation of innkeeper and guest subsisted between Wiatt and the proprietor of the hotel at the very time the money was received by the clerk, or at the time of the loss, no recovery could be had for such loss.

The testimony produced in behalf of the plaintiff below, reflecting upon what occurred after he entered the hotel and before his departure therefrom (having deposited his money), is confined to three witnesses; the plaintiff himself, one Mullen, and Scott, a bell boy of the hotel.

Wiatt testified that he entered the hotel about ten minutes after two o'clock in the morning, accompanied by his

friend Mullen, and applied to the clerk for accommodations.

He says: "I asked for accommodations that night; I says to him: 'How are you fixed for accommodations?' He says: 'Very well, as we have not been doing very much since the Exposition.' I says: 'Very good, let me have a room, and I will stop with you to-night.' He says: 'All right, I will just take your name. I am busy now making up my night account. I will just take your name.' I says: 'Very well, I have been eating something and I do not care about retiring now, I will be back in perhaps a half an hour.'"

Repeating, he testifies: "I says: 'I want a room.' At the time he was busy at the side desk, looking over some books. He says: 'I am engaged now, just making up my night account, or night report;' says he: 'I will take your name and reserve you a good room.' I says: 'Very good.' I then produced this package of money. I said: 'I would like to leave this with you.'"

He delivered the package to the clerk and received, as a check for it, a slip of paper with his name written thereon by the clerk. He says: "I then passed out through the west end of the Arcade; some question was asked me by my friend, and I says: 'I was going up as far as Mr. Wallace's, The Turf Exchange.' Q. Did you go there that night? A. Yes, sir. Q. You say some one was with you, who was that? A. Mr. Mullen. Q. Did he accompany you to Wallace's? A. Yes, sir. Q. When did you leave there? A. I left there in the neighborhood of five o'clock. Q. Where did you go to then? A. Direct from there to the Hotel Emery."

Without reciting his testimony concerning what occurred upon his return to the hotel, it will suffice to say that the clerk and the money were missing; he soon became concerned for his money, and these, with other circumstances, may sufficiently account for his failure to take a room for the balance of the night, or morning.

He further testified that there was \$2,195 in the package

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left with the clerk, and that his business required about that amount of money. The foregoing testimony was in chief.

Then follows :

“Cross-examination by Mr. Jenney: Q. You say your business requires that much money; what is your business?

A. I was engaged in operating a club room here.

Q. To speak plainly, a gambling room? A. Yes, sir.

Q. Where is it? A. At No. 266 Vine street. Up over Gilligan's place.

Q. You were playing that night? A. I was doing business.

Q. You were carrying on business that night? A. Yes, sir.

Q. After you left the Hotel Emery, did you carry on business both before and after you left the Hotel Emery?

A. No, sir; not after I was in there.

Q. You were not? A. No, sir; I left this money at the hotel as a safeguard.

Q. Because you did not want to carry it around? A. Yes, sir.

Q. You left the money there simply for safe keeping? A. No, sir; I didn't.

Q. What was your object in leaving it there? A. I left it there as a guest of the hotel.

Q. Why did you leave it there? A. I left it there not wanting to carry it on my person that time in the night.

Q. You left the hotel and you expected to go out around the city? A. No, sir; I didn't expect to go; if I had found agreeable friends in the hotel I should have perhaps staid there and smoked, and perhaps not went out at all.

Q. You are a married man? A. Yes, sir.

Q. You are keeping house? A. Yes, sir.”

After stating that he was keeping house at the time of his loss, and that his wife had gone to attend upon and remain with her invalid mother on the night in question, he testifies :

“After attending to my business, it being rather late, and the neighborhood being rather a disreputable one, as

everybody knows that is familiar with it, I did not care to carry this amount of money with me, and go home and not find anybody there; and I told my wife I would stop down at the hotel to-night. So I had considered the matter before I left my place of business, that I would stop at the Hotel Emery. I had no intention of going home that night."

His friend, Mullen, testifies in chief:

"Examined by Mr. Campbell—

Q. On the night or morning of the 14th of October, you may state whether, or not, you were in company with Mr. Wiatt; were you with him? A. Yes, sir.

Q. Where did you meet him that evening, first? A. I met him at Andy Gilligan's.

Q. Where did you go from there with him? A. We went down Vine street to Bessehl's, or Harff & Kramer's.

Q. What did you do there? A. We had a glass or two of beer, and something to eat—we had some oysters.

Q. From there, where did you go? A. I proposed to Mr. Wiatt to go up home; I had been in the habit of going home with him frequently; probably three or five times a week I would go partly home with him; he said that he was not going home that evening, that his wife was absent.

Q. Then, where did you go? A. We went down to the Hotel Emery."

"Q. You said the clerk asked him if he wanted a single or double room? A. Yes, sir.

Q. Mr. Wiatt responded, what? A. That he wanted a single room.

Q. What next occurred? A. He asked him if he wanted to go to bed now; he said, 'No, not right now; I want to leave some money here, and I will be back after a while.' He pulled out his package, and asked for an envelope to put it in."

On cross-examination, he says:

"Q. Mr. Wiatt said that he did not want to go to bed,

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but that he would be back after a while? A. He said something about being back after while.

Q. He did 'nt want a room then? A. He said something about wanting a room. He asked if they had a room, and the clerk told him that they had room, and he asked him if he wanted a single or double room, and he said a single one, and the clerk said they could accommodate him; and he said, he did n't want to go to bed now, and the clerk said, I will reserve you a room; and then Mr. Wiatt said, 'here, I want you to take care of this,' and took out his money."

The witness, Scott, testified as to what transpired between Wiatt and the clerk, as follows:

"Q. What did Mr. Wiatt say? A. He came in and asked how he was fixed for accommodations.

Q. Yes, what was said? A. He said very well, not been doing much since the Exposition.

Q. And what more was said; any thing else? A. He said that he wanted a room. I was sitting over there, and the clerk, knowing I was a bell-boy, he called me over and said, take this gentleman to a room. Mr. Wiatt said: 'Not just now; I am going out.'

Q. Do you know whether he gave any money to the clerk? A. Yes, sir."

The foregoing comprehends, substantially, the testimony which is most favorable to Wiatt, concerning what occurred at the time he delivered his money to the clerk, and bearing upon the relation which then subsisted between the former and the proprietor of the hotel.

(At the time the clerk took charge of his money, Wiatt had not registered his name; it was not entered upon any of the books of the hotel; no room had been assigned him; and while it is not necessary to contend that all, or any, of these facts were necessary to constitute him a guest of the hotel, they are valuable aids in determining, in the light of the other proof in the case, whether that relation in fact existed. There is proof which may account for his failure to register. Still, if he had registered, and this is

shown to have been for the purpose of securing a safe depository for his money, it would not avail him.

It will not do to contend that the deposit of his money contributed to constitute him a guest. Unless he was a guest, the clerk had no authority to bind his principal by receiving the money.

In *Carter v. Hobbs*, 12 Mich. 52, it is held:

"In order to make one liable as innkeeper at the common law, for goods lost at his inn, it must appear that he was acting in the capacity of innkeeper on the occasion when the goods were received, and that the owner was his guest; in other words, that the latter visited the inn for purposes which the common law recognizes as the purposes for which inns are kept."

In *Gelley v. Clerk*, Cro. Jac. 188: Defendant was an innkeeper at Ubridge. Plaintiff was his guest. Plaintiff left his goods at the inn, and went to London, saying he would return in two or three days. He returned within three days and found his goods had been stolen. Action on the case was brought for the value of the goods, and it was held:

"If one come to an inn and leave his goods and horse, and go into the town, and afterward returns, and in the meantime his goods are stolen, no doubt but he is a guest, and shall have a remedy. And so was *Sir Edwin Sands's case*; for his absence in part of the day is not material, but he is always reputed as a guest. So, where one leaves his horse at an inn, to stand there by agreement at livery, though neither himself nor any of his servants lodge there, he is reputed a guest for that purpose, and the innkeeper hath a valuable consideration; and, if the horse be stolen, he is chargable with an action, upon the common custom of the realm. But, as in the case at the bar, where he leaves goods to keep, whereof the defendant is not to have any benefit, and goes from hence for two or three days, although he saith he will return, yet he is at his liberty, and therefore is not a guest during that time, nor is the innkeeper chargeable as a common hostler for the goods

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stolen during that time, unless he make an especial promise for the safe keeping of them ; and the action should be grounded upon it."

In *Grinnel v. Cook*, 3 Hill, 485, the court held :

"An innkeeper is bound to receive and entertain travelers. If a traveler, having stopped at an inn, leave his horse there and go out to dine or lodge with a friend, he does not thereby cease to be a guest. The same rule holds good, so far as relates to property, for the care and keeping of which the innkeeper is to receive a compensation, though the traveler leave the inn to go to a neighboring town, intending to be absent several days. Otherwise, however, in respect to inanimate property, from which the host derives no advantage."

"If a traveler leave his horse at an inn, he shall be deemed a guest, even though he lodges elsewhere ; but not, if he leave any dead thing as luggage." Wharton's Innkeepers, 76.

An innkeeper is not bound to receive the goods of a person who only desires the use of the inn as a place of deposit. *Ibid.* 79 ; *Bennet v. Mellor*, 5 Term R. 274 ; *Mateer v. Brown*, 1 Cal. 221.

The inquiry is suggested here, in the light of the citation from *Carter v. Hobbs*, *supra* : Did Wiatt visit the hotel, on the morning in question, "for purposes which the common law recognizes as the purposes for which inns are kept" ?

That he did not stand in need of, and that he did not desire nor ask for, the present accommodations of that hotel, at the time he first stood at its office counter, is so overwhelmingly established by the proof, as to exclude every other conclusion.

He testifies for himself, that when the clerk said he would take his name, "I says: 'Very well, I have been eating something and do not care about retiring now. I will be back in perhaps half an hour.'" He then passed out, went to the "Turf Exchange," and remained until 5 o'clock. His friend and witness, Mullen, testifies that the clerk asked him (Wiatt) if he wanted to go to bed now,

and he said, "No, not right now; I want to leave some money here, and will be back after awhile." His witness, Scott, testifies: "The clerk, knowing I was a bell-boy, he called me over and said take this gentleman to a room. Mr. Wiatt said, 'Not just now; I am going out.'"

What was he there for? To the suggestion that he may have been prospecting for lodgings in advance of his actual needs, the obvious answers are (1) he does not say so, and (2) he conclusively silences all cavil upon this question by his statement: "So I had considered the matter before I left my place of business, *that I would stop at the Hotel Emery*. I had no intention of going home that night."

He had already, it seems, unconditionally selected his lodgings. He was no stranger at that hotel. He had been a frequent day guest of the house. He testifies, in chief: "I have been a patron of the Hotel Emery for four years or over."

This leads us to the further vital inquiry: Why did he go to that hotel in advance of his actual present need of the entertainment and accommodations which it was prepared to afford its guests?

There is one answer, and only one, to be found in the proof to this question.

Wiatt testifies, that after he had delivered his package of money to the clerk and received the check for it, "I then passed out through the west end of the Arcade. Some question was asked me by my friend (Mullen), and I says I was going up as far as Mr. Wallace's—the Turf Exchange." He further says, on cross-examination:

"I left this money at the hotel as a safeguard.

Q. Because you did not want to carry it around? A. Yes, sir.

Q. You left the money there simply for safe-keeping? A. No, sir; I didn't.

Q. What was your object in leaving it there? A. I left it there as a guest of the hotel."

This answer involves the statement of no substantive fact. It is a mere conclusion. It assumes the principal

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fact in controversy—that the witness was a guest of the hotel. It involves no contradiction of any fact which the proof tends to establish. Immediately following this answer is the “Question. Why did you leave it there? A. I left it there, not wanting to carry it on my person that time in the night.

Q. You left it there and you expected to go out around the city? A. No, sir; I didn't expect to go; if I had found agreeable friends in the hotel, I should have *perhaps* stayed there and smoked, and *perhaps* not went out at all.”

There is much force in the following observation of counsel for plaintiff in error concerning this answer:

“This is not sustained by other parts of his testimony. He came there with Mullen, with whom he had been eating oysters and drinking beer, and who had been in the habit of partly going home with him from three to five times a week, and who accompanied him when he left the hotel. Mullen must have been an agreeable friend, else he would not have been so much in his company, and his alleged excuse for not staying at the hotel is untenable.”

It is a conclusive answer, however, to the claim that this statement of Wiatt is in conflict with the other proof, to say that at best it is a statement of his own secret intentions, wholly undisclosed to the hotel company, through its clerk or otherwise, and in sharp collision with every act and word of his at the time he left his money with such clerk. It is mere speculation, on the witness stand, upon what “perhaps” might have, but did not, happen at the time of the deposit of his money. The facts made known to the clerk, the conduct and language of Wiatt in his presence with the other facts which transpired at the time, made it his plain duty to refuse to receive the money, and it was beyond his power to bind the proprietor of the hotel by its receipt.

But Wiatt further testifies, as we have seen: “After attending to my business, it being rather late, and the neigh-

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borhood being rather a disreputable one, . . . I did not care to carry this amount of money with me, and go home and not find anybody there," etc.

Mullen says that he (W.) said to the clerk: "I want to leave some money here, and will be back after awhile. . . . He said that he did n't want to go to bed now, and the clerk said, I will reserve you a room; and then Mr. Wiatt said, 'Here, I want you to take care of this,' and took out his money."

The one answer to the inquiry, as to the purpose of his first visit at that hotel at 2 o'clock in the morning is: He sought it as a safe depository for his money, that he might be free to follow the promptings of his own will and pleasure for the balance of that night with no risk of its loss. This is the only rational conclusion from the testimony, and furnishes the true solution of his failure to register, of the absence of his name from all the books of the hotel; of the fact that no room was assigned him; that he did not insist upon having a room assigned; that he did not ask or desire to be shown to a room; that it was after 5 o'clock in the morning when he returned to the hotel; and to all that transpired during his first visit there.

Innkeepers are not liable as such for goods deposited with them by any but guests of their inns. While an individual proprietor of an inn may incur a liability as bailee for the safe keeping of goods which he has voluntarily undertaken to keep for others than guests, it is not within the course of employment of a mere clerk of such innkeeper to receive on deposit the goods of any except guests of the inn, and if he does so, it is a transaction between him and the owner, and no liability for the loss of such goods attaches to the innkeeper.

It will be observed that we have confined the consideration of this branch of the case to the simple question: Was Wiatt a guest of Hotel Emery at the time of the deposit of his money with its clerk? If he was a guest at that time, his subsequent conduct did not dissolve or affect

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the relation existing at the time of such deposit. If that relation did not exist at that time, his subsequent conduct could not create it; although, if the direct evidence upon that issue had been involved in conflict, it would have been proper to consider such subsequent conduct in determining the actual relation of the parties at the time of such deposit.

As the evidence did not fairly tend to prove Wiatt a guest of the hotel at the time of the deposit of his money, there was error in rendering judgment for him, and in overruling the motion for new trial.

Judgment reversed and cause remanded.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OHIO.

JANUARY TERM, 1886.

HON. SELWYN N. OWEN, CHIEF JUSTICE.
 HON. MARTIN D. FOLLETT,
 HON. WILLIAM T. SPEAR,
 HON. W. W. JOHNSON,
 HON. THAD. A. MINSHALL,

} Judges.

PELTON v. BEMIS.

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Revised Statutes, Sec. 5848—Action to recover back illegal assessment—Pleading—Averment of legal conclusion—Limitation of action—Assessment in installments.

1. In an action brought under section 5848, of the Revised Statutes, to recover back an assessment that has been collected, on the ground that it was illegally assessed, it is not sufficient to aver that the assessment is illegal and void, such averment being simply a legal conclusion; the facts must be stated so that the court may judge whether or not the same is illegal and void.
2. When, for the purpose of collection, an assessment is divided into two or more installments, payable annually or otherwise, the limitation of time in which the action can be brought, as provided in said section, begins to run against such installment from the time of its collection, and not from the collection of the last installment.

ERROR to the District Court of Cuyahoga county.

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The plaintiff below, Fred. C. Bemis, commenced his action in the court of common pleas, under sections 5848 and 5850 of the Revised Statutes, to recover back certain assessments upon his property that he had paid to the defendant as treasurer of the county. The petition, containing a cause of action for each payment (four in all), was filed June 24, 1879. The averments of the first cause of action are as follows:

“The plaintiff alleges:

“1. That during the years 1876, 1877, and 1878, the defendant, Frederick W. Pelton, was treasurer of Cuyahoga county, and the plaintiff was and still is the owner of sublots 29, 30, and 31, of Nicola and Judson’s allotment of a part of original lot 328, all of which lots have a frontage and are situated on Kinsman street, in the city of Cleveland, county and state aforesaid.

“2. That on the fifth day of September, A. D. 1876, the city of Cleveland, a municipal corporation under the laws of the State of Ohio, by the passage of a so-called ordinance by the city council of said city, caused a special assessment for the grading, draining, paving, and improving of Kinsman street, in said city of Cleveland, to be made and levied upon all of the aforesaid lots, in the total sum of nine hundred and eighty-two dollars and five cents (\$982.05), payable in five annual installments to the treasurer of Cuyahoga county, the first installment payable on or before the 20th day of December, A. D. 1876, and one installment annually thereafter until all should be paid; and that said city of Cleveland caused and procured said special assessment to be entered upon the general duplicate for the collection of taxes in and for said county of Cuyahoga.

“And this plaintiff further alleges and avers that said special assessment, so made, levied, and entered upon said general duplicate as aforesaid, was and is wholly illegal and void.

“3. This plaintiff further says that on the 8th day of November, A. D. 1876, the defendant, Frederick W. Pelton,

then treasurer of Cuyahoga county, at his office in said city of Cleveland, refused to receive from said plaintiff the state, county, and city taxes, exclusive of said special assessment, charged on the duplicate against the aforesaid lots of this plaintiff, and thereby illegally and wrongfully forced and compelled this plaintiff to pay to said defendant, and this plaintiff did, then and there, under said force and compulsion, in order to save the aforesaid lots from being returned as delinquent and sold, pay to said defendant the sum of \$98.20, the said sum being the first half of the first installment claimed to be due upon said special assessment, so as aforesaid made, levied and entered upon said duplicate.

"And this plaintiff further says that at the time of making the aforesaid payment to said defendant he entered his solemn protest against the payment of the same."

The second cause of action is substantially as the first, except that the payment was made June 15, 1877.

The third cause of action was substantially as the first, except that the assessment was for the sum of \$1,809.40, and covered an additional lot, and the installment of \$130.94 sought to be recovered back was paid January 18, 1878.

The fourth cause was substantially as the last, except that the installment \$98.20 was paid on the 24th of June, 1878, just within the year prior to the commencement of the action.

The defendant demurred separately to each cause of action, on the ground that it did not state facts sufficient to constitute a cause of action; and, finally, upon the same ground, to the entire petition.

The court sustained the demurrer to the first, second, and third, and overruled it as to the fourth cause of action; and there being neither amendment nor further pleading, judgment was rendered for the defendant upon the first three causes of action, and against him for the sum of \$98.20 on the last one.

On error, the district court of the county affirmed the judgment of the common pleas on each cause of action.

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And this proceeding is now prosecuted in this court on the petition of defendant below to reverse the judgment against him upon the fourth cause of action; and by the plaintiff below upon a cross-petition to reverse the judgment against him upon the first three causes of action.

The demurrer to the first three causes of action was sustained on the ground that each one was barred by the limitation contained in section 5848 of the Revised Statutes, to wit, one year from the payment of the assessment. And this is assigned for error by the plaintiff below upon his cross-petition.

The plaintiff in error claims that, (1) it does not sufficiently appear in the petition that the assessment was illegal, and (2) the petition does not show an involuntary payment; and for these reasons asks that the judgment against him be reversed.

Kain, Sherwood & Bunts, for plaintiff in error.

It does not sufficiently appear in the petition that the assessment was illegal.

The petition simply asserts a conclusion of law.

Whether or not the assessment was illegal and void was the very essence of the action, and was for the court to determine from facts, alleged or proved.

The right to recover depended chiefly upon whether or not the tax was illegal, and the court erred in taking for granted upon an allegation of plaintiffs, the very matter which it was its duty to determine from facts presented.

“Matter of law is never matter to be alleged in pleading. No issue can be framed upon an allegation as to the law. Facts only are pleadable, and upon them without allegation the courts pronounce and apply the law. This is true alike in respect to statutes and to the common law.” *Pomeroy's Remedies and Remedial Rights*, § 530; *People v. Commissioners, etc.*, 54 N. Y. 276-279; *Commonwealth v. Cook*, 8 Bush, 220-224; *Clark v. Lineberger*, 44 Ind. 223, 228, 229; *Peterson v. Roach*, 32 Ohio St. 374; *Railroad Co. v. Moore*, 33 Ohio St. 384.

James Fitch and John E. Ensign, for defendant in error.

It is not claimed by the plaintiff in error, and it nowhere appears in the record that any question as to the sufficiency of the averment in plaintiff's petition as to the illegality of the assessment, was in fact raised by the defendant below, or that the question was considered, passed upon or determined.

Questions as to the sufficiency of the averments in pleadings can only be raised by motion to make definite and certain, or to strike out, and not by demurrer, and if the defect in the statement of facts does not amount to a want of a cause of action, or defense, but the facts or the ultimate fact can be resolved into, or, if well stated, would constitute a valid cause of action or defense, a demurrer is not proper, but a motion to make definite and certain is the proper mode of objecting. Pom. Rem., § 549; Bliss Code Pl., § 213; *School Sec. 16 v. Odlin*, 8 Ohio St. 293, 297; *Schrock v. Cleveland*, 29 Ohio St. 499; *Union Bank of Massilon v. Bell*, 14 Ohio St. 208; Swan's Pl. 153-157; *Thompson v. Cook*, 21 Iowa, 472; *Gilmore v. Norton*, 10 Kan. 491.

The averment in the petition, that, "said special assessment, so made, levied and entered upon said general duplicate as aforesaid, was and is wholly illegal and void," is not merely a conclusion of law. Although it is a conclusion from certain other facts not represented, it is, nevertheless, an averment of a fact. It has some of the elements of fact in it; it is a statement of an ultimate fact, or of an admitted fact, or it may be a statement of a fact judicially determined by a court of competent jurisdiction.

There can be no doubt that if the plaintiff in error had answered that averment in the court of common pleas by a general denial, proof could have been offered of the illegality of the assessment under the issue as thus made up, and the plaintiff in error would have thereby waived any objection as to the sufficiency of the averment. So by filing his demurrer he has waived any objection that he might have made to the averment by motion.

The authorities cited by counsel for plaintiff in error in support of his proposition that the averment of the petition

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as to the illegality of the assessment, is a conclusion of law, decide that a demurrer to a pleading admits facts only which are well pleaded, and not mere conclusions of law. We do not dispute the authority of those cases at all, but whether or not his demurrer admits the truth of the allegation in the petition, it certainly stands admitted by his failure to answer and deny it.

That such an allegation is an averment of fact, see *Higgins v. Pelton*, 4 Cin. L. Bull. 751; Bates Pl. & Pr. 132.

There are several exceptions to the general rule that facts and not conclusions of law must be averred. Code of Civil Procedure of 1853, §§ 121, 122, 124, 558.

So the act of 1856, under which this action was brought, having been passed after the code was adopted, provided a special remedy for relief against illegal taxes and assessments. And we think that act, if fairly construed, authorizes an action of this character to be maintained by averring and showing two facts: (1) That the tax or assessment is illegal; and, (2) That it has been collected by those authorized by law to make the collection of such taxes or assessments.

If illegal taxes or assessments can be collected, then it seems proper to aver in a petition that such taxes or assessments are illegal, and have been collected.

MINSHALL J. For the purpose of convenience we will first consider whether the first, second and third causes of action contained in the petition of the plaintiff below, were barred by the limitation contained in the statute at the commencement of the suit. The language of the statute (§ 5848 Rev. Stat.) is, "no recovery shall be had unless the action be brought within one year after the . . . assessments are collected."

It is claimed that an assessment is an entirety, and that the statute does not begin to run, where the assessment is divided into installments, until the payment of the last one. We are of a different opinion. It may be conceded that as respects the making of an assessment, it is to be regarded

as an entirety—the sum the land should bear as its proportion of the cost of the improvement, according to benefits conferred; but it does not follow that it must be so regarded as respects the mode of collection. When, for the latter purpose, it is divided into installments, one of which is to be paid each successive year until all are paid, each is to be regarded as a separate demand; and, if the assessment itself is illegal, each involuntary payment of an installment, constitutes a wrong for which a remedy is given by an action to recover back the amount so paid, within the period of one year from the collection thereof. By way of illustration, the purchase-money agreed to be paid as the consideration for the conveyance of a piece of land, is, as to the consideration, an entirety; but where, by the agreement of the parties, it is divided into certain annual installments, the statute in such case begins to run as to each, from the time it becomes due and payable. The only difference in the two cases is, that in the former the right of action arises from the collection of an installment of an illegal assessment, under circumstances which show that the payment was involuntary; and, in the latter, it arises from the omission of the purchaser to pay an installment of the purchase-money according to the terms of his agreement. The involuntary payment of that which is an illegal assessment on the lands of the plaintiff, is the gravamen of the action, whether the amount paid is the whole or but a part of the assessment. Any other construction would be unjust to assessment payers and inconvenient to the public. The fact that the right of action is limited to a year after the “assessment” has been collected, should not, as we think, have the controlling effect claimed for it by counsel for the plaintiff below. It does no violence to the probable intention of the legislature in this regard, to say, that, in the use of the word “assessments,” installments are included; that is where an assessment is, for the purpose of collection, divided into installments, each installment is to be regarded as an assessment. Therefore the judgment of the district court affirming the

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judgment of the court of common pleas upon the demurrer of the defendant below to the first, second and third causes of action contained in the petition, should be and is affirmed, the action not having been commenced within a year from the payment in either case.

It remains to be considered whether the judgment rendered against the plaintiff in error upon the fourth cause of action should be reversed. We are of the opinion that it should, for the principal reason, that it does not appear as a matter of fact, that the assessment, an installment of which is sought to be recovered back, was illegal. The averment as to this, in the pleading, is simply that it was illegal and void. But this is a legal conclusion, and does not present an issue of fact. The facts from which it is claimed the illegality arises, should be stated, that the court may judge whether the assessment was illegal or not.

There are certain cases in which legal conclusions, stated in connection with certain averments of fact, have been held sufficient at least after verdict; as, for instance, an averment of indebtedness on account of goods sold and delivered, or of work and labor performed, at the request of the defendant; for the facts stated import an indebtedness. But we know of no case, and certainly none has been cited, that has gone to the length of holding that an averment that the defendant is indebted to the plaintiff, would support a recovery in any instance; and yet such an averment is no more purely a question of law, than an averment that an assessment is illegal and void. The rule of pleading with its distinctions in this regard, is treated by Bliss in his work on Code Pleading, at § 213 and § 334, which see with the cases cited by the author; also Pom. Rem., § 580, and the cases cited in the note thereto.

It is claimed by counsel for the defendant in error that this question was not made below. However this may be, it is made by the demurrer to the cause of action on which the judgment was rendered against the plaintiff in error;

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is now insisted on by his counsel, and, being an error apparent on the record and assigned for error, can not be disregarded by this court on the statement of counsel that it was not insisted on below. Judgment must be given upon and not against the record.

As to the point that the petition does not show an involuntary payment, there is an unresolved doubt in the minds of the court. Whether the only compulsion to which the plaintiff was subjected, was that unless he paid his taxes proper, his lots would be returned delinquent and sold, and thereby, and for no other reason, he was compelled to pay the assessment, is not clear. If it were clear that this is the proper construction of the pleading, then a doubt arises as to whether a payment made under such circumstances only would amount to an involuntary one. But inasmuch as the judgment must be reversed and cause remanded for further proceedings for the reason already given, it is not deemed advisable to pass on the question in the form presented.

Judgment affirmed upon the first three causes of action; and reversed upon the fourth, and cause remanded to the court of common pleas for further proceedings

WAGNER v. ZIEGLER.

Bill of Exceptions—Signed by but one of three judges—When court may direct verdict in contest of will.

1. A paper purporting to be a bill of exceptions, signed by one judge only of the three judges holding the district court, will not be considered as part of the record, although the journal entry in the case recites that a bill of exceptions is presented, which, being found by the court to be true, is allowed, signed, sealed, and made part of the record, and no other paper purporting to be a bill of exceptions appears in the files in the case. *Skillito v. Thacker*, 43 Ohio St. 63, approved and followed.

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2. In the trial of the contest of a will, where the testimony introduced does not tend to prove the issue on the part of the plaintiffs showing incapacity of the decedent to make a will at the time the will was made, it is not error for the court, at the conclusion of the plaintiffs' testimony, to direct the jury to find a verdict sustaining the will.

ERROR to the District Court of Auglaize county.

The action below was to contest the will of Frederick W. Ziegler, and was commenced by the filing by the plaintiffs in error of a petition, as follows:

"Sophia Wagner and William Ziegler, plaintiffs, against Charlotte Ziegler, Margareta Ziegler, Ricka Ziegler, Mary Ziegler, Freddie Ziegler, Louisa Vossler, Mollie Ziegler, Emma Ziegler, William Steinkamp, Christian Steinkamp, Sr., Dr. Christian Steinkamp, Jr., William Cordis (or Kores), Louis Cordis (or Kores), and Edward Purpus, executor of F.W. Ziegler, deceased, defendants. State of Ohio, Auglaize county, ss. Court of common pleas. Civil action. Petition. Said Sophia Wagner, one of said plaintiffs, says that she is a married woman, wife of Peter Wagner, and that this action concerns her separate estate.

"Said plaintiffs, Sophia Wagner and William Ziegler, respectfully represent that on or about the 13th day of April, 1880, one Fred. W. Ziegler, then a resident of New Bremen, in said county of Auglaize, died testate, leaving a last will and testament of that date, which will was, on the 19th day of May, 1880, duly probated in the probate court of Auglaize county, Ohio; a copy of said will, etc., is hereto attached, marked "A," and made a part hereof.

"Said F. W. Ziegler died, leaving the following named persons, his widow and heirs at law, to wit: Charlotte Ziegler, widow, residing at New Bremen, Auglaize county, Ohio. Heirs at law, said plaintiffs and Margaret Ziegler, widow, and Ricka Ziegler, Mary Ziegler and Freddie Ziegler, heirs of Henry Ziegler, deceased, residing in the state of Alabama; Louisa Vossler, wife of Michael Vossler, residing in Auglaize county, Ohio, and Mollie Ziegler and Emma Ziegler, of the same place. The following named persons are the legatees of said will, to wit: Wilhelmina

Steinkamp, Christian Steinkamp, Sr., Christian Steinkamp, Jr., William Cordis (or Kores), and Louis Cordis (or Kores), all residing in Hamilton county, Ohio. Said Edward Purpus, of Auglaize county, Ohio, is the duly qualified and acting executor of said deceased Fred. W. Ziegler. Said F. W. Ziegler died seized in fee of considerable real estate and the owner of some personal estate, all of which is described in said pretended will. Said plaintiffs further represent that said will so probated as aforesaid is not the last will and testament of said deceased, because at the time of execution thereof said F. W. Ziegler was not of sound mind and disposing memory, and did not have sufficient mental capacity to make a will. Said plaintiffs further say that said executor, notwithstanding the facts aforesaid, is threatening to settle and distribute the estate of said deceased in accordance with the terms of said will so as aforesaid probated. Said plaintiffs therefore pray that said pretended will and the probate thereof may be set aside and held for naught, and that until the final hearing hereof said executor may be restrained from proceeding under said will, and for all proper relief."

The will referred to in the petition is as follows:

"The last will and testament of Frederick W. Ziegler, of New Bremen, Auglaize county, Ohio. In the name of the benevolent Father of all: I, the said Frederick W. Ziegler, being of sound and disposing mind and memory, considering the uncertainty of continuance in life, and desiring to make such disposition of my worldly estate as I deem best, do make, publish and declare this to be my last will and testament, hereby revoking and annulling any and all former will or wills, whatsoever, by me made. *First.* I desire all my just debts and funeral expenses to be paid as soon as possible after my decease. *Second.* I give and bequeath to my daughter Louisa, married to M. Vossler, my two lots lying in Vogalsangstown and owned at present by me, to be hers forever. *Third.* I desire that my sister, Wilhelmina Steinkamp, shall have my house and lot in Piqua, to be hers forever. *Fourth.* I give and be-

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queath to Christ. Steinkamp the sum of two hundred dollars. *Fifth.* I give and bequeath to William Kores the sum of two hundred dollars. *Sixth.* I give and bequeath to Louis Kores the sum of two hundred dollars. I nominate and appoint Edward Purpus to be the executor of this will. In witness whereof, I have hereunto set my hand and seal, this 13th day of April, in the year eighteen hundred and eighty. F. W. ZIEGLER. [SEAL.]”

Issue was joined by the filing by some of the defendants of an answer containing the following averments:

“Defendants admit each and every allegation set forth in plaintiffs’ petition, except the allegation ‘that said will, as probated, is not the last will and testament of said decedent, because at the time of the execution thereof said F. W. Ziegler was not of sound mind and disposing memory, and did not have sufficient mental capacity to make a will,’ which allegation the said defendants deny. The above-named defendants, further answering said petition, aver that said will, as probated, is the last will and testament of the said F. W. Ziegler, and that said F. W. Ziegler, at the time of the execution thereof, was of sound mind and disposing memory, and had sufficient mental capacity to make and execute a will.”

A trial was had in the court of common pleas, which resulted in a verdict for the plaintiffs. From the judgment thereon rendered some of the defendants appealed to the district court, and filed in that court an appeal bond, the condition of which is as follows:

“The condition of the above obligation is such, that whereas, Wilhelmina Steinkamp, C. Steinkamp, Jr., C. F. Steinkamp, and William Cordes, have taken an appeal from a certain judgment setting aside a will of F. W. Ziegler, rendered against them in favor of the said Sophia Wagner and William Ziegler in the court of common pleas within and for the county of Auglaize, in the State of Ohio, at the February term, A. D. 1882, thereof, for setting aside the will of Frederick W. Ziegler, deceased, to the district court within and for said county of Auglaize. Now, if the

said Wilhelmina Steinkamp, C. Steinkamp, Jr., C. F. Steinkamp, and William Cordes shall abide and perform the order and judgment of the appellate court, and shall pay all moneys, costs, and damages which may be required of, or awarded against, said C. Steinkamp, Jr., C. F. Steinkamp, and William Cordes, by said district court, then this obligation shall be void, otherwise in full force in law."

A motion was filed in the district court by the plaintiffs, to dismiss the appeal for the reason that the bond is insufficient and invalid in law, and insufficient in form and amount. This motion was heard upon evidence and overruled, to which plaintiffs excepted. A trial to a jury followed. At the conclusion of the plaintiff's evidence, and after argument, the court, finding there was no evidence proving or fairly tending to prove the issues on part of the plaintiffs showing incapacity of the deceased to make a will, directed the jury to find a verdict sustaining the will. Thereupon the jury returned a verdict accordingly. Motion for new trial being overruled, judgment of affirmance was entered, and costs adjudged against plaintiffs, to all which they excepted. Afterwards an entry was made on the journal to the effect that the plaintiffs present to the court their certain bill of exceptions herein, which, being found by the court to be true, is allowed, signed, sealed, and, on motion, is made part of the record of this case. The paper, called in the printed record "bill of exceptions," purports to contain the testimony given upon the hearing of the motion to dismiss appeal and that given at the trial. It is signed and sealed by the judge who presided at the trial, but not by either of his associates.

Von Seggern, Phares & Dewald, for plaintiffs in error.

1. The statute governing the contest of wills is imperative that the trial must be by jury. This means that the question whether or not the paper writing presented is the last will must be determined, not by the court, but by the jury, and this whether any evidence is introduced or not.

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It is a question of fact which the court has no authority to determine under any circumstances.

The court judges of the competency of the evidence, the jury of its truth, tendency, value, and sufficiency. The court will never presume to decide upon its sufficiency, however slight it may be. This is for the jury. *Walker v. Walker*, 14 Ohio St. 157, 176; *Cooch v. Cooch*, 18 Ohio, 150; *Holt v. Lamb*, 17 Ohio St. 375; Revised Statutes, § 5861.

There were sufficient facts admitted by the pleadings, tending to prove the issue, to require the case to be submitted to the jury.

2. The entry made by the court with respect to the bill of exceptions, was equivalent to a signing by the judges.

3. The cause was brought into the district court by an insufficient appeal bond. C. F. Steinkamp, one of the parties named in the bond as appellant, was not a party to the suit. No judgment was ever rendered against him in the case, and not being a party, judgment could not have been rendered against him in the appellate court. This being so, there could be no breach of the bond. The bond speaks for itself, and the law is that it shall so speak, and that the liability of sureties is limited to the exact letter of the bond. Sureties stand upon the words of the bond; and if the words will not make them liable, nothing can. There can be no construction, no equity against sureties. If the bond can not have effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail. *Myres v. Parker*, 6 Ohio St. 501; *McGovney v. State*, 20 Ohio, 93.

The bond might have been amended, but that not having been done, the appeal should have been dismissed. Revised Statutes, § 5233.

T. W. Brotherton (with whom was *R. L. Walters*), for defendants in error.

The bill of exceptions was signed by but one of the three judges composing the court. It is provided by the Revised Statutes, § 5302: "If the exception be true . . .

a majority of the judges composing the court must allow and sign it before the case proceeds." Hence there is no bill of exceptions, notwithstanding the journal entry. The pretended bill itself contradicts the record, and can not be considered by the court.

As the testimony on the part of the contestants of the will is not before the court, the plaintiffs in error can rely only on the declaration of the journal entry that the court "finding there was no evidence proving, or fairly tending to prove the issues on part of said plaintiffs," directed the jury to find a verdict sustaining the will.

The reasoning of the opinions in *Walker v. Walker*, 14 Ohio St. 157, and *Holt v. Lamb*, 17 Ohio St. 375, cited by counsel for plaintiffs in error, is to the effect that the proponents of the will have the right to have a jury pass upon the validity of the will *under proper instructions* by the court. The contestants, not the proponents, are complaining of the directions or instructions of the court.

When there is no evidence proving, or *fairly tending* to prove the issue, upon the plaintiff to establish, he having the *onus probandi*, in all civil cases triable to a jury, the court may, and it is its duty, on motion of defendant—the motion being in the nature of a demurrer to the evidence—to direct the verdict of the jury. *Stockstill v. D. & M. R. Co.*, 24 Ohio St. 83; *Dick v. Railroad Co.*, 38 Ohio St. 389; *Wells L. & F.*, §§ 329, 527, 532; *Rich v. Rich*, 16 Wend. 663; *Pleasants v. Fant*, 22 Wall. 116.

SPEAR, J. We give attention to the questions argued by counsel so far as they are presented by the record: 1. Did the district court err in overruling the motion of the plaintiffs to dismiss the appeal? 2. Did that court err in finding that there was no evidence proving, or fairly tending to prove the issues on part of plaintiffs showing incapacity of the deceased to make a will, and in directing the jury to find a verdict sustaining the will?

As to the first: The reason urged in argument why the motion should have been sustained, is that C. F. Stein-

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kamp, one of the parties named in the bond as appellant, was not a party to the suit. Is this shown? One of the defendants of record is Christian Steinkamp, Sr. The motion was heard upon evidence. That evidence is not before us. Notwithstanding the journal entry given in the statement of the case, the evidence contained in the paper purporting to be a bill of exceptions, can not be examined by this court, the paper having been signed and sealed by one only of the three judges who held the district court. *Shillito v. Thacker*, 43 Ohio St. 63. All presumptions are in favor of the judgment. For aught that appears, it may have been shown that the party named as C. F. Steinkamp in the bond was the identical party defendant named as Christian Steinkamp, Sr, in the petition. The middle initial is not infrequently dropped in the naming of parties, and it is not unreasonable to treat the affix of "Sr." as a superfluity. The record discloses no error in overruling the motion to dismiss the appeal.

In support of the charge of error upon the second ground, it is insisted that there were sufficient facts admitted by the pleadings, taken in connection with the will, tending to prove the issue to require the case to be submitted to the jury. Many of the assumptions and statements of the brief are founded upon facts assumed to exist because of testimony set out in the alleged bill of exceptions. Having already found that we have no bill of exceptions in the record, it would be a needless use of space to consider them. As to the allegations of the petition taken with the will, the court below was of opinion that they furnished no evidence tending to show incapacity on part of the deceased. We do not deem it necessary to take time with this point more than to say that we agree with the district court in that view. And having found, on conclusion of plaintiffs' testimony, that there still was no evidence tending to prove incapacity on part of the deceased to make a will at the time the will was made, what was the duty of the court?

It is urged that, in passing upon the sufficiency of the

evidence and directing the jury to bring in a verdict sustaining the will, the court exceeded its power, and the plaintiffs were thereby deprived of their statutory right to a trial by jury. In other words the claim is, that whatever the state of the proof—however completely the plaintiff fails to make the slightest *prima facie* case—yet the court must, perforce, send the case to the jury, omitting the usual and ordinary instructions which, in other cases, under like circumstances, would be given. The statute, in regard to the contest of wills in force at the time of the trial below, Revised Statutes, sec. 5861, and following, provides that an issue shall be made up, whether the writing produced is the last will of the testator or not, which shall be tried by a jury; and, unless a new trial be granted, or the cause appealed, the verdict shall be conclusive, and the court shall enter judgment thereon; that, on the trial, the order of probate shall be *prima facie* evidence of the due attestation, execution, and validity of the will; that the party sustaining the will shall be entitled to open and close the evidence and argument—he shall offer the will and probate, and rest. The opposite party shall then offer his evidence. The party sustaining the will shall then offer his other evidence; and rebutting evidence shall be offered as in other cases. An appeal may be had to the district court; and that court shall direct the issue tried in the court below to be re-tried in that court in the same manner.

The court may not dispose of the case by a decree, nor by a judgment rendered for mere insufficiency of pleading. There must be a jury trial, if the case proceeds at all. But is the jury trial necessarily other than the common law trial by jury? We look in vain, in the brief tendered, for any satisfactory reason why it should be. The statement is, that the court judges of the competency of the evidence, the jury of its truth, tendency, value, and sufficiency. But why? In other jury trials, the court judges not only of the competency of testimony offered, but, when it is all in, whether any evidence has been given tending to sustain the claim of the party upon whom the burden is. In con-

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tests of wills, manifestly, the burden is on the plaintiffs. By the introduction of the will, and order of probate, a *prima facie* case has been made against them. Suppose they offer no testimony at all, would not the plain duty of the court be to so say to the jury? And, if so, why not take the next step, and say that, under such circumstances, it would be their duty to find in favor of the will? And upon what principle is it that testimony, which does not tend to support the issue at all, is of more force in law than no testimony?

The language of the opinion in *Walker v. Walker*, 14 Ohio St. 157, is cited. Speaking of trial by jury, Brinkerhoff, J., on page 176, says that "this provision of the statute is imperative in its terms, and we have reason to believe that it was deliberately enacted with a view to prevent a disposition of cases for the contest of wills upon the mere consent or acquiescence of parties in any form." This language, and the statute as well, may properly be read in the light of our knowledge of the mischief sought to be remedied, which was, speaking from tradition and history, a tendency to procure the setting aside of wills by consent decrees in chancery. The first statute upon the subject provided that, when the widow or person of kin appeared to contest the will, the court should take cognizance thereof and grant proceedings thereon according to law. This furnished an easy mode of disregarding the expressed wish and purpose of the dead testator, and necessitated a change incorporating, as a requirement, trial by jury, as in the present statute. This statute, taken as a whole, negatives any idea that the legislature intended to encourage the setting aside of wills; quite a contrary purpose is manifest. No argument can be needed to sustain this view; a bare reading of the statute abundantly supports it. And we venture the statement that the predominating idea is, that wills, which have been duly admitted to probate and record in the probate court, shall not be set aside by mere consent of parties. The affirmance of the will but leaves the parties where they were before suit commenced. The judg-

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ment of the probate court is binding until a verdict sets its order aside.

But the controlling feature of the case cited, as applied to the case under consideration, is found in the third paragraph of the syllabus, which is: "In a proceeding under the statute to contest the validity of a will, it is error to render final judgment on demurrer to an answer. An issue must be made up and tried by a jury, under proper instructions by the court." We emphasize: "*Under proper instructions by the court.*" "Proper instructions" are such as the law of the case, and the testimony before the jury, make pertinent. It is difficult to see how this case of *Walker v. Walker* gives any color to the idea, that the statute is intended to dethrone the court and make the jury supreme. The statute provides the order in which the testimony shall be introduced, gives legal effect to the will and order of probate, and requires the case to be submitted to the jury. In other respects the trial is to be conducted as other jury trials are conducted; and it is the duty of the court in that case, as in other cases, to give proper instructions to the jury. And it may well be treated, not as having effect to enlarge the rights of the parties during trial, but as furnishing a rule of procedure only.

There are other assignments of error, but they are disposed of by the disposition of those herein considered. We find no error in the record.

Judgment affirmed.

DAVIS v. GELHAUS.

Partnership—Conversion of township funds by partner—Liability of firm—Accounting between partners.

Davis and Gelhaus were partners in business for a series of years. During the same time Davis was township treasurer, and was in the receipt of the public funds of the township. With the knowledge, consent and approval of Gelhaus, Davis deposited the greater portion of these funds in bank, to the firm's credit, in common with the private funds of the

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partnership, and from time to time debts of the firm, as well as debts due upon orders drawn on the treasury, were indiscriminately paid by the firm's check on this deposit. In 1879 the partnership was dissolved, and by mutual consent Davis purchased the stock of goods on hand, and took the notes and accounts receivable to be collected, and out of assets arising from such purchase, and out of collections, he was to pay all partnership liabilities. In a schedule of such liabilities there was over \$6,000 due the township which Davis paid before the hearing in the court below. The books of the firm showed that no attempt was made to treat this deposit of public moneys otherwise than as partnership moneys, and they were used as a common fund, subject only to partnership check. *Held* :

1. That such deposit and use of the public moneys by Davis, as treasurer, was in violation of section 15 of "an act to establish the independent treasury of the State of Ohio" (2 S. & C. 1606), it being a conversion of the public moneys to the use of the partnership of which he was a member.
2. That Gelhaus having, with full knowledge, consented and approved of this mode of doing business, and having participated in such acts, is, in law, alike guilty with Davis in such unlawful conversion of public money.
3. That the partnership was liable to the public authorities for the money thus converted.
4. That they are *particeps criminis* in this transaction, and the law will aid neither as against the other, but will leave them where it finds them. Neither is entitled to relief as against the other, by contribution or otherwise. Upon a dissolution of the partnership, under an agreement that Davis should take all the assets and pay all the partnership liabilities, and account to Gelhaus for one-half the surplus, he paid this liability to the township partly out of partnership assets and partly out of his own individual means which he advanced, leaving a large balance in his favor, the assets being insufficient for that purpose. This consummated the illegal transaction, and he has no right of contribution from Gelhaus for the money so advanced.
5. That Gelhaus being liable as a partner to the township for the illegal conversion of the money, and having parted with all his interest in the partnership by the contract of dissolution, reserving only a right to one-half the surplus, is not entitled to an account which rejects the payments made by Davis. The law leaves him where it finds him, with the right only to an account for surplus remaining after crediting Davis with amounts paid on this illegal transaction.

ERROR to the District Court of Hardin county.

August 5, 1880, Gelhaus, who was plaintiff below, filed a petition, stating that about May 1, 1865, he and Davis entered into a partnership and engaged in the grocery busi-

ness during such period as they might thereafter agree on, and so continued by mutual consent as such partners until February 9, 1880, when, by like consent, said firm was dissolved. Davis was to take the stock then on hand, collect the assets due the firm, and pay its debts, and from time to time render accounts of his proceedings, and on final adjustment should pay over to Gelhaus one-half (they being equal partners) of what was left after satisfying all partnership liabilities.

In pursuance of this agreement Davis became the sole owner of the stock then on hand as per invoice, together with all other assets, for the purpose of winding up the partnership. He charges that no statements have ever been made, either before or since the dissolution, of the condition of the firm, and that Davis refuses to make a settlement with him of said partnership business. Also that the business during fifteen years was largely profitable. He prays that an account be taken, and that on final hearing Davis be compelled to pay over to the plaintiff whatever may be found due him.

On September 29, 1880, Davis answered, denying that the business had been largely profitable, and denying that he had refused to render statements to his co-partner.

He sets out the agreement of dissolution by which he was to take the stock on hand at the invoice, the notes and accounts due, and convert the same into money and pay off the partnership liabilities as far as they would go.

He attaches several exhibits, showing the condition of things at the time of the dissolution, and also notes and accounts collected on firm account, and the liabilities of the firm paid since February 9, 1880.

Among these is Exhibit "C," which he avers contains a true statement of the liabilities of the firm at the date of dissolution, amounting to \$9,830.24; of this amount \$6,893.22 are alleged to be liabilities of the firm as public moneys belonging to Pleasant township, Hardin county.

Between the time of dissolution, February 9th, Davis had paid of these public moneys sufficient to leave a bal-

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ance of \$5,424.70 at the date of filing his answer, to wit, September 29, 1880. Gelhaus died October 4, 1880, and Curtis Wilkin was appointed his administrator, and on the 6th of January, 1881, filed a reply stating that he has no knowledge of the matter set up in the answer, and therefore denies each allegation thereof, except as to the existence of the firm and the agreement for dissolution. He repeats the prayer for an account and for other and further relief.

The case was then referred to a master to hear the evidence and to report his findings of law and fact to the court. The real and only matter in controversy, as shown by the proceedings, is as to whether the debt due Pleasant township was a partnership liability or the individual liability of Davis. At the time the case was heard in the common pleas, Davis had paid all liabilities, amounting to \$9,709.30, which included the amount due to the treasurer of Pleasant township. The common pleas found that this liability to Pleasant township was a partnership liability, and that its payment by Davis came within the terms of the agreement of dissolution, which authorized him to pay all partnership liabilities of the firm, and that, as such liability had been paid by him, he was entitled to a credit therefor the same as for any other liability of the firm.

Wilkin, as administrator, took an appeal to the district court, where the judgment of the common pleas was reversed, holding that as to these public moneys owing to Pleasant township, they were not partnership liabilities, and the court refused to give him credit for the amount paid in satisfaction of them after dissolution, and struck from his credits numerous orders paid on account of the firm before his answer, and refused to allow him credit for the residue owing to the township, which he had paid before the hearing in the common pleas.

As to the amount of "firm liabilities as set out in second defense of answer of defendant, \$5,424.70, alleged to be due the defendant as treasurer of Pleasant township of said county, the court do find that during the entire period of

said partnership, Archibald M. Davis was the treasurer of Pleasant township, in said county, and of the incorporated village of Kenton, during the greater part of said time. That during said partnership, and from September, 1865, to the dissolution thereof in 1880, said Archibald M. Davis, as treasurer as aforesaid, did receive of said public money the sum of \$171,178.56, and during said period did disburse thereof \$164,752.57, leaving a balance due said corporation and township, at the date of dissolution of said firm, of \$6,415.99.

“That from February 17, 1869, to the dissolution of said firm in 1880, said Archibald M. Davis did deposit of said public moneys received as aforesaid, in bank, to the credit of the firm of Davis & Gelhaus, the sum of \$155,285.05. That no separate account was kept in bank of the public moneys so deposited, but the same was carried into and made a part of the bank account of the firm of Davis & Gelhaus. That it was the custom of the said Archibald M. Davis to pay corporation and township orders, the amount not being shown by the evidence, from the money he drew and received as aforesaid; and, after such payment, to deposit the balance remaining in bank to the credit of Davis & Gelhaus.

“That no partnership account was kept with Archibald M. Davis showing the amount of moneys which the firm received from the said Archibald M. Davis as treasurer, except as the same appeared in the bank pass-books.

“That August Gelhaus knew that said Archibald M. Davis was depositing the public moneys aforesaid to the credit of the firm of Davis & Gelhaus in bank, and made no objection to the same, but on the contrary was a party to and approved the same.

“That, at the time of the dissolution of said firm, statements were made of the liabilities of said firm of Davis & Gelhaus, and said statements contained, among other liabilities, the balance due from Archibald M. Davis as treasurer as aforesaid, to said corporation and township at date of the dissolution of said firm, Exhibit ‘C,’ in defendant’s

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answer, being a copy thereof; and that said statements were furnished to each of the members of said firm, and no objection made thereto until the bringing of this suit. That at the dissolution of said firm there was a balance in bank to the credit of said firm (being the bank where said public moneys were deposited as aforesaid) of \$760.08, all except said sum being checked out.

“That the proof fails to show what was done with said sum of \$155,285.05 of public moneys so deposited as aforesaid, except that the same, as well as all firm deposits, had been checked out of bank (except said balance of \$760.08) at the date of the dissolution of said firm. That the conclusion from the foregoing is, that in the absence of proof as to what was done with the said \$155,285.05 of public moneys deposited as aforesaid, that the said Archibald M. Davis, as treasurer as aforesaid, performed his duty, and paid the same out according to law; and that no part of the said moneys were used by said firm, and that no firm liability has been established as to said public moneys above specified.

“That since the commencement of this action the said defendant, Archibald M. Davis, has paid the amount due said township of Pleasant, and said incorporated village of Kenton. And thereupon came the said defendant, Archibald M. Davis, and excepted to the findings of the court and filed his motion herein to set aside said findings and grant a new trial herein; and the court, having heard said motion for a new trial, do overrule the same, to which ruling the said defendant then and there excepted.”

Judgment was accordingly rendered against Davis for the amount of public moneys so paid by him, on the theory that this liability to the township was not a partnership liability, and that he alone was liable to the township, etc.

John McCauley, Henry W. Seney, and George E. Seney,
for plaintiff in error.

A. Blackford, and Stillings & Allen, for defendant in error.

JOHNSON, J. The sole question in the case is, whether, upon the facts found by the district court, Davis was entitled to credit for the payment in full of the amount of public money which the firm books showed was then due the corporation and township, to wit, \$6,415.99, or whether that amount so paid should be eliminated from the partnership liabilities. It is found that from February 17, 1869, said Davis, as treasurer, did deposit said public moneys in bank, to the credit of the firm, the sum of \$155,285.05; that no separate account was kept in bank or by the firm of the public moneys so deposited, and that no partnership account was kept with Davis as treasurer of the amount, which the firm received from him as treasurer, except as the same appeared in the bank pass-books. It is a significant fact, found by the court, that while Davis was depositing these public moneys to the credit of the firm, Gelhaus made no objection to such deposit, but on the contrary, was a party to and approved the same. This made both members of the firm personally liable in the transaction. The public moneys so deposited, as well as the partnership moneys, were by the act of the parties mixed together, and the findings show that the bank account of the firm was subject to check to pay private or public demands. It is further found that, at the time of dissolution, a statement was made of firm liabilities which, among other liabilities, showed the balance which the firm owed to Davis as treasurer at the date of such dissolution, and that such statement, of which Exhibit "C" is a copy, was furnished to Gelhaus, who made no objections thereto until the bringing of this suit. I may add that, in the petition filed in this case, no objection was made to the assets of the firm being used to satisfy the demands due the township and corporation, nor does it appear that any objection was ever made, to this mode of doing business, but that it was approved by Gelhaus. Both parties concurred in depositing the public moneys in bank to the credit of the firm.

It was thereby converted to its use. It was mixed with

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deposits of the firm. It was subject only to check in the firm name. In all respects it was treated by the parties as partnership moneys, out of which the partnership paid orders drawn upon Davis as treasurer. This credit to the firm on the books of the bank, became the common credit of the firm and the township. All this was with the knowledge, consent and approval of Gelhaus. The presumption held by the district court to exist, that no part of said funds were used by the firm, and that no firm liability existed, is at variance with the facts found, and the law of the case. These facts made the partnership liable to the township for money had and received.

This was a loan by the treasurer to his firm, approved by Gelhaus.

It does not appear that Davis was using these moneys for his individual gain, but with the consent of his co-partner they were loaned to the firm. For a long series of years these moneys had thus been at the disposal of the firm. Davis received no credit for them on the partnership books. Gelhaus seems to have regarded these public moneys as partnership liabilities, during the many years they were so deposited to the credit of the firm. He certainly so regarded them at the time of dissolution. He stipulated that Davis should take all the assets and pay all the partnership liabilities. At the same time he received a copy of the schedule of such liabilities, which included the amount due the corporation and township.

That each of these partners were equally guilty in the eye of the law for embezzling the public money is clear. See section 15 of an act, "To establish the independent treasury of the State of Ohio" (2 S. & C. 1610).

This section, which was in force at the time of this transaction, provides; "that if any officer or other person, charged with the collection . . . or disbursement of the public money . . . belonging to the state, or to any county or township, or organized city or village in this state, shall convert to his own use, or to the use of any other person or persons . . . or party whatever, in any way

whatever, or shall use by way of investment . . . or in any other manner or form whatever, or shall loan, with or without interest to any company . . . or individual . . . any portion of the public money . . . or in any other way or manner, or for any other purpose; or if any person shall advise, aid, or in any manner participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, as shall be thus converted, used, invested, loaned, deposited or paid out as aforesaid; which is hereby declared to be a high crime and misdemeanor, "etc.

The penalty upon conviction, subjects the person or persons to imprisonment in the penitentiary from one to twenty-one years, and to a fine equal to double the amount of money so embezzled, for the benefit of the parties in interest.

In view of the stringent provisions of this section, and of the facts found by the court, Gelhaus was guilty of advising, aiding and participating in converting to partnership uses the public moneys belonging to the township, and therefore was a *particeps criminis*, equally guilty with Davis and equally benefited by the transaction. *Brown v. The State*, 18 Ohio St. 496; *Commissioners v. Bank of Findley*, 32 Ohio St. 194. This section applies to township treasurers, as well as to other public officers. *State v. Morton*, 21 Ohio St. 669. We are thus led up to the question, what were the rights of these parties in this transaction (each being guilty of embezzlement), as against each other? At the time of the trial in the common pleas, the public demand for the money had been satisfied by Davis paying the same. It thus became a *consummated transaction*.

If Davis were individually liable to the public for such repayment, and Gelhaus was not, then he could not recover from the latter, for there is no contribution among wrongdoers; so, if as a partner he paid the money out of his own means, no contribution could be had for a like reason. The same is true of Gelhaus, each being guilty of a high crime or misdemeanor, no contract obligations between them are

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enforceable at law. The law leaves them where it finds them. Where does it find them in this case?

For a series of years these specific public moneys were mingled with the partnership moneys, by deposit to the credit of the firm in bank, subject only to a partnership check, with the mutual consent of both partners. Out of this deposit both the firm liabilities and the public liabilities were paid indiscriminately. When they dissolved, in 1879, Gelhaus put into the possession of Davis all the assets of the partnership, the latter bought the stock of goods at an invoice price, he took the notes and accounts due with sole authority to collect them, and out of the money so collected, and the amount to be paid for the stock of goods, he was to pay off all the partnership liabilities, and divide the surplus equally with Gelhaus. Upon the facts in this case, there was no surplus. Davis paid off all the liabilities including the amount due the township and corporation. To do this he advanced of his own moneys some \$5,600, the assets being insufficient. He now claims contribution from Gelhaus for one-half the money so advanced. If the conversion of this money had not been in violation of the law, he would be entitled to such contribution. But as it is, he is not so entitled. The law leaves him where it finds him. For a like reason Gelhaus is not entitled to the relief he asks. He was personally liable, jointly with Davis, to the township and corporation to restore to them the money jointly converted to their own use. He recognized this as a partnership liability during the series of years they were partners, by allowing it to be deposited in the firm name in bank, and by allowing it to be drawn on from time to time to pay orders on his co-partner as treasurer. At the time of dissolution, it was stipulated that Davis should pay all partnership liabilities, and he then received a schedule of the same, the greater part of which embraced these public moneys owing to the township and corporation. The law will leave him where it finds him. He had delivered all the assets to Davis.

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The stock of goods Davis owned absolutely by purchase, the notes and accounts due, he had possession of by agreement of the parties. All that he was liable to Gelhaus for, was one-half of the surplus, after paying partnership liabilities. As there was no surplus, there is no liability of Davis. Gelhaus can not be relieved from the payment of his share of this liability to the public which Davis had actually paid out of the firm assets. If there had been a surplus, his right to one-half is clear, but as there was none, the law leaves him where it finds him, as well as it does Davis. *It finds the illegal transaction consummated*, and neither party can disturb it. It finds Davis to have advanced money to discharge the partnership obligations to the township and corporation, and a large amount of worthless assets in his possession. It will leave him there.

Therefore, the court of common pleas was in error in allowing Davis contribution from his co-partner. It finds Gelhaus with no right to question what has been done under this illegal transaction. Davis, in paying off his public liability, has consummated the illegal transaction, and Gelhaus can not obtain affirmative relief by now repudiating the arrangement on his part. The district court, therefore, erred in opening up this consummated illegal transaction by throwing out of the credits in favor of Davis the amount he paid to discharge this partnership liability, and in dividing the uncollected assets in specie. These assets were entrusted to him by contract, to be collected and accounted for. It does not appear that he has violated that trust. If, hereafter, enough is collected to reimburse him, and leave a surplus, he is liable to his copartner for his share thereof. Our conclusion is, that upon the present state of facts, neither partner has a right to recover of the other any money judgment. And that Davis is entitled to these uncollected assets to be accounted for under their contract of dissolution, counting the payment by him of the balance due for money advanced to pay the public as a partnership liability for the purpose of ascertaining

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if there is a surplus to be divided. 1 Colyer on Partn., §§ 56 to 65, and notes.

Judgment reversed and cause remanded.

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Negligence—Remote and proximate cause—Fire spreading to other building.

1. Where fire is negligently thrown from a mill smoke stack and carried to a building outside the mill property, and thence to another building of a third party, and thence to other property that is damaged by the fire; whether such negligence is the proximate cause of such damage, is a question of fact for the determination of the jury under the instructions of the court.
2. In an action against a mill owner for damages to property caused by fire negligently or carelessly thrown by sparks from the smoke stack of the mill and carried to the property by a gale of wind blowing at the time in the direction of the property, by which fire the same was damaged; where the conditions continue the same as when the negligent and careless act was done, and no new cause intervenes, it is no defense that the fire first burned an intervening building and was thence communicated by sparks and cinders in the same manner to the building in which such fire consumed the property; though the buildings were separated by a space of two hundred feet.

ERROR to the District Court of Mercer county.

Isaac W. Young brought suit before a justice of the peace for \$299.97, for household and kitchen furniture destroyed by the burning of his family residence in the town of Macedon, in Mercer county. On appeal Young averred in his petition that Adams owned and controlled a steam engine, boiler and fixtures, and a machine for dressing staves, and propelled by steam; that the engine, boiler and fixtures, were placed within one hundred feet of a frame stable in the town, and within three hundred feet of his dwelling house; and that the smoke stack attached to the boiler was defective and unsafe in this, that the screen upon

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the smoke stack was coarse and furnished no protection against sparks, and was in other respects defective, and the defendant well knew the same; and that on the 2d day of May, 1878, the wind was blowing heavily from a south-westerly to a north-easterly direction, and in the direction of the stable and the dwelling; and one George Watson, who was the employe and agent of defendant, and who was managing the machinery, did on said 2d day of May, 1878, fire up and start the machinery, and so negligently, carelessly and improperly run and operate the same, that by reason of the defective and insufficient screen aforesaid, and careless and negligent conduct and management of the machinery, *and under the gale of wind aforesaid*, and the proximity of the machinery to the stable and dwelling aforesaid, that the sparks from the smoke stack set fire to the stable and the dwelling house so occupied by plaintiff.

Plaintiff therefore avers that by carelessness, negligence, and improper conduct and management of the machinery, boiler, smoke stack, etc., *and under the gale of wind aforesaid*, by the agent and employe of defendant, the defendant did set fire to and burn up and destroy the goods and chattels, etc., the property of plaintiff.

To the petition Adams answered as follows:

I. That he admits that the plaintiff was, at the time the same was consumed by fire, the owner of the personal property as averred in the amended petition. And that the defendant further admits that at the time he was the general owner of the engine, boiler, smoke stack and machinery described in the amended petition.

But the defendant, in further answer to the amended petition, says:

That he denies each and every averment therein contained not herein before admitted.

II. And the defendant, for a second cause of defense, and for a further answer to the amended petition, says:

That the stable described in the amended petition was at the time of the happening of the pretended grievances

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complained of, situated one hundred feet or more in a north-easterly direction from the engine, smoke stack, and machinery described in the amended petition, and that the dwelling house of one James S. Crawford was then situated two hundred feet or more in a north-easterly direction from the stable. That the house of Crawford then contained large quantities of gunpowder, coal oil, and other explosive and highly combustible substances, and that the property of plaintiff was situated in a frame building sixty feet or more north of the house of Crawford.

And the said defendant avers that the fire which burnt and consumed the said property of plaintiff was communicated to said house of Crawford by sparks and cinders from said stable, and from said house of Crawford to said house in which plaintiff's said property was situated, and from said last named house to said property of plaintiff, and that in no other manner was said personal property set on fire and destroyed or injured.

The said defendant therefore prays that he may go hence without delay and with his costs.

To the second defense Young demurred, because the same did not state facts sufficient to constitute a defense. This demurrer was sustained, and the cause was tried upon the petition and first defense. The jury found that Young ought to recover of Adams; a motion for new trial was overruled, and a judgment for Young was entered.

On proceedings in error, the district court affirmed the judgment, and plaintiff in error now seeks to reverse these judgments.

Isaiah Pillars and T. J. Godfrey, for plaintiff in error.

The leading case in New York upon the question involved is *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210. The syllabus is as follows:

"The negligent burning of a house, and the spreading of the fire to a neighboring house, and the burning thereof, do not give the owner of the last house a cause of action

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against the owner of the house in which the fire originated. The damages are too remote.

"The New York Central Railroad Company, by the negligent manner of conducting an engine, or by the defective condition of the engine, set fire to a quantity of wood in one of their sheds. The fire consumed the woodshed, and spread to and consumed the house of the plaintiff, situate about one hundred and thirty feet distant from the shed. *Held*, that no cause of action existed in favor of the plaintiff against the railroad company, by reason of such loss."

The supreme court of Pennsylvania, in *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353, held:

"In determining accountability for the consequences of a wrongful act, the immediate, and not the remote cause is to be considered.

"An engine on a railroad negligently set fire to a house, the fire from the house communicated to another at some distance from it, which was consumed with all its contents. *Held*, that the railroad company were not liable for damages for the last building and its contents.

"Every one has to take the risks of the vicissitudes of organized society.

"The person committing the first act of negligence is not liable for all its consequences."

The injury in the case at bar was still more remote. The sparks from the engine fire the stable one hundred feet away, which fired Crawford's building two hundred feet away, which fired the building in which were the plaintiff's goods, situated sixty feet from Crawford's building.

Thus the sparks were the cause of the cause of the cause of the burning of plaintiff's goods.

We submit that the case of *Webb v. Railroad Company*, 49 N. Y. 420, does not in any manner reverse or modify the holdings in the two cases just cited.

In that case, as well as the case of *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373, the fire was continuous.

When the cases referred to by counsel on the other side

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are carefully examined, it will be found that in nearly every case they present facts showing that the injury complained of was the result of not several, but a continuous fire; in fact, but one fire. Such was the case in *Perley v. Eastern Railroad Co.*, 98 Mass. 414. And even that case was alone maintained by virtue of a statute of Massachusetts.

In support of the position herein contended for, we further refer to *Macon & Western R. Co. v. McConnell*, 27 Ga. 481; also to a monograph published by Dr. Wharton, entitled, "The Liability of Railway Companies for Remote Fires—Proximate and Remote Cause."

Le Blond & Loughridge, for defendants in error.

Counsel for the plaintiff in error seem to rely chiefly upon *Ryan v. New York Cent. R. Co.*, 85 N. Y. 210, and *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353. The latter case seems to rely solely upon the former for its guidance, coupled with the magnitude of the consequences that might result from a negligent act, rather than the establishment of a sound principle of law, applicable in all cases.

The case of *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420, has so modified these cases as to give them no controlling force. See, also, *Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474.

We maintain that it can not be held as a matter of law, that by reason of the stable and Crawford's house intervening between the machinery and Young's property, that the injury is too remote, and the cause not proximate. The question is not one of distance or intervening objects, but whether a man of reasonable judgment should not anticipate the injury from his negligent act under all the surrounding circumstances.

There may be innumerable intervening objects and spaces, and yet the damage may be the proximate result.

In support of this view of the case we submit the following decisions as the law of this case, and call the court's attention especially to the case of *Fent v. Toledo, Peoria &*

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Warsaw Railroad Co., 59 Ill. 349; *s. c.*, 14 American Rep. 13, which is a review of all the American and English decisions on the subject of remote and proximate cause. Also, *Annapolis & Elkridge Railroad Co. v. Gantt*, 39 Md. 115; *Phila., etc., Railroad Co. v. Constable*, 39 Md. 149; *Atch., etc., Railroad Co. v. Stanford*, 12 Kan. 354; *St. Joseph, etc., Railroad Co. v. Chase*, 11 Kan. 47; *Kellogg v. Chicago & N. W. Railroad Co.*, 26 Wis. 224; *Perley v. Eastern Railroad Co.*, 98 Mass. 418; *Higgins v. Dewey*, 107 Mass. 494; *Del., etc., Railroad Co. v. Salmon*, 39 N. J. 299; *Hooksett v. Concord Railroad Co.*, 38 N. H. 243; *Burlington, etc., Railroad Co. v. Westover*, 4 Neb. 269; *Coates v. Miss., etc., Railroad Co.*, 61 Mo. 38; *Poeppers v. Miss., etc., Railroad Co.*, 67 Mo. 715; *Doggett v. Richmond, etc., Railroad Co.*, 78 N. C. 305; *Hoyt v. Jeffers*, 30 Mich. 181; *Milwaukee & St. P. Railway Co. v. Kellogg*, 94 U. S. 469.

Whether the cause is proximate or remote, is a question of fact to go to the jury under the instructions of the court. *Henry v. South Pac. Railroad Co.*, 50 Cal. 176; *Atchison, etc., Railroad Co. v. Bales*, 16 Kan. 252; *Fent v. Toledo, etc., Railroad Co.*, 59 Ill. 349.

FOLLETT, J. Was the negligence of Adams the *proximate cause* of the loss sustained by Young? The law does not regard an injury from a *remote cause*. There is no dispute as to the legal proposition; the difficulty is as to its proper application to the particular case.

The sustaining the demurrer to the second defense, is the only complaint of the plaintiff in error. There is no complaint of the trial on the first defense, in which the jury found against the plaintiff in error, and in which the jury must have found that his negligence was the proximate cause of the loss of the goods.

Does the second defense show, as a matter of law, a bar to Young's recovery? This defense is, that *the fire* which burnt and consumed the property was communicated to the house of Crawford by sparks and cinders from the sta-

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ble, and from the house of Crawford to the house where the property was situated, and then to the property.

It is not claimed that this fire was not the *same fire* communicated to the stable by sparks from the smokestack, when Adams' agent negligently and carelessly fired up and started the machinery. So, from the petition and answer, it is shown, that the fire, started by Adams, is *the fire* that consumed the goods.

Adams does not aver or claim that there was any new agency or cause at any point of the line of this fire, and does not aver or claim that the "gale of wind" increased in force or changed in direction.

The stable and the houses were not *causes* of communicating the fire, but they were only *conditions* of the communication, existing when the fire was started. Strictly, the law knows no cause but a responsible human will; and when such a will negligently sets in motion a natural force that acts upon and with surrounding conditions, the law regards such human actor as the *cause* of resulting injury. "As a legal proposition, we may consider it established, that the fact that the plaintiff's injury is preceded by several independent conditions, each one of which is an essential antecedent of the injury, does not relieve the person, by whose negligence one of these antecedents has been produced, from liability for such injury." Whar. Neg., § 85.

Adams does not aver his ignorance of the surrounding conditions, or that there was any thing unusual about them, or any change as to them.

The objection as to *distance* through the air is disposed of by the averments of the answer, that the fire *was* thus communicated, the surrounding conditions being as they were, and no other cause being shown. There is no averment that this loss is not a probable and ordinary result of the negligence of the plaintiff in error; and this principle is an important test, if it is not the only test. Whar. Neg., § 150.

Ryan v. New York Cent. R. Co., 35 N. Y. 210, and *Pennsyl.*

vania R. Co. v. Kerr, 62 Pa. St. 353, have been referred to as decisive here. The courts rendering those decisions have sufficiently "distinguished and explained" them.

In case of *Webb v. Rome W. & O. R. Co.*, 49 N. Y. 420, Folger, J., on page 427, says: "I do not understand . . . that the decisions in 35 N. Y., and 62 Pa. St., *supra*, put forth any new rule of law, or one which has not been acted upon and recognized, *pari passu*, with the recognition and growth of the principles upon which most of the cases above cited are based. In *Ryan's case*, the opinion of the court was that the action could not be sustained, for the reason that the damage incurred by the plaintiff was not the immediate but the remote result of the negligence of the defendant." He then says, *Kerr's case* is the same in material facts, principle, and reasoning. And he then says, page 428, "I am of the opinion, that, in the disposition of the case before us, we are not to be controlled by the authority of the case in 35 N. Y. more than we are by that of the long line of cases which preceded it." And the court there *held*, "He who, by his negligence or misconduct, creates or suffers a fire upon his own premises, which, burning his own property, spreads thence to the immediately adjacent premises and destroys the property of another, is liable to the latter for the damages sustained by him." And on the facts there, also *held*, "In an action for the damages, that the questions as to whether defendant was negligent in the use of its property, and as to whether the injury was a probable consequence of the negligent acts and omissions, were properly submitted to the jury."

In *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373, Chief Justice Agnew says, on page 379, "But let us examine the case of *Railroad Co. v. Kerr*, and it will be found to be free from much of the criticism expended upon it." "It was not *held* in *Railroad v. Kerr* that when a second building is fired from the first, set on fire through negligence, it is a mere conclusion of law that the railroad company is not answerable to the owner of the second; or that if a fire is communicated from the locomotive to the field of A,

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and spreads through his field to the adjoining field of B., A. may be reimbursed by the company, while B. must set down his loss to a remote cause, and suffer in silence;”—thus answering *Fent v. T. P. W. R. Co.*, 59 Ill. 362 and 358, *infra*.

And in that case the court held, “Sparks from defendants’ engine fired a railroad tie, from which rubbish left by the defendants on their road was fired, communicated with plaintiff’s fence next to the road and spread over two fields, burned another fence and standing timber six hundred feet distant from the road. Held, that the proximity of the cause was for the jury.

“In such case the jury must determine whether the facts constitute a continuous succession of events so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result can not be said to be the natural and probable consequence of the negligence of defendants.”

In the opinion the chief justice says, page 378, “In determining this relation, it is obvious that we are not to be governed by abstractions, which, in theory only, cut off the succession. Abstractly each blade of grass or stock of grain is distinct from every other; so one field may be separated from another by an ideal boundary, or a different ownership, or it may be by a real but combustible division line. . . . It is at this point the province of the jury takes up the successive facts, and ascertains whether they are naturally and probably related to each other by a continuous sequence, or are broken off or separated by a *new* and *independent cause*.”

Some states, as Massachusetts and New Hampshire, have provided by statutes that railroad companies shall be liable for damage caused by fire communicated by its locomotive engines. And in *Perley v. Eastern R. Co.*, 98 Mass. 414, damage was recovered for injury to property situated half half a mile distant from the railroad.

In the state of Kansas, damage has been recovered for injury to property situated many miles distant from the origin of the fire. *Atchison, T. & Santa Fe R. Co. v. Stanford*, 12 Kan. 354. In case of *Atchison, T. & Santa Fe R. Co. v.*

Bales, 16 Kan. 252, it was held, "Where fire, which is negligently permitted to escape from an engine of a railroad company, does not fall upon the plaintiff's property, but falls upon the property of another, setting it on fire, and then spreads by means of dry grass, stubble and other combustible materials, and passes over the land of several different persons, before it reaches the property of the plaintiff, and finally reaching the property of the plaintiff at a great distance from where the fire was first kindled, sets it on fire and consumes it: Held, that the negligence of the railroad company, in such a case, is not too remote from the injury to the plaintiff's property to constitute the basis of a cause of action against the company."

In case of *Poeppers v. M., K. & P. Ry. Co.*, 67 Mo. 715, sparks from the locomotive set fire to the prairie where the grass was rank. The wind was high and the fire extended three miles before night, then died down, and the next morning the wind rose and carried the fire five miles further, where the fire destroyed plaintiff's property. The court held, "that as the rise of the wind was a thing which a prudent man might reasonably have anticipated, it could not be regarded as the intervention of a new agency, so as to relieve the company from the consequences of its negligence in permitting the fire to escape; and that the fire was in fact one continuous conflagration, notwithstanding the lapse of time and the great distance over which it traveled before reaching plaintiff's property." In Missouri this may be correct.

In *Del., Lack. & West. R. R. Co. v. Salmon*, 89 N. J. Law, 800, the court held, "Where one, by negligence or misconduct, occasions a fire on his own premises, or the premises of a third person, which spreads from thence to the plaintiff's property, and causes an injury, the injury is not, as a legal proposition, too far removed from his negligent act to involve him in legal liability." And *Ryan v. New York Cent. R. Co.*, and *Pennsylvania R. Co. v. Kerr*, *supra*, are disapproved.

The case of *Kellogg v. The Chicago and N. W. Ry. Co.*, 26 Wis. 223, was fully considered, and the court held, "The maxim, *causa proxima non remota spectatur*, is not controlled

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by time or distance, nor by the succession of events. An efficient adequate cause being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. The maxim includes liability for all actual injuries which were the natural and probable result of the wrongful act or omission complained of, or were likely to ensue from it under ordinary circumstances." And *Ryan v. New York Cent. R. Co.*, and *Pennsylvania R. Co. v. Kerr*, *supra*, are disapproved.

In the case of *Fent v. The Toledo, Peoria and Warsaw Ry. Co.*, 59 Ill. 349, the opinion delivered by Chief Justice Lawrence, disapproved of *Ryan v. New York Cent. R. Co.* and *Pennsylvania R. Co. v. Kerr*, *supra*, and deals at length with remote and proximate cause. The court there hold, "If fire is communicated from a railway locomotive to the house of A, and thence to the house of B, it is not a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate, cause of the injury to B, but that is a question of fact to be determined in each case by the jury under the instructions of the court. . . .

"If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency—if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind—such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible."

In *Milwaukee and St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, the claim was that fire was negligently communicated from

a steamboat of the company by sparks from the chimney to an elevator of the company built of pine lumber, and one hundred and twenty feet high, and standing on the bank of the river, and from the elevator to a saw-mill and lumber piles of Kellogg. The mill was five hundred and thirty-eight feet distant from the elevator, and the nearest pile of lumber was three hundred and eighty-eight feet distant from it. When the steamboat went along side the elevator, an unusually strong wind was blowing from the elevator towards the mill and lumber. The case was from Iowa. The court held, "The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine in view of the accompanying circumstances. A finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, is not warranted unless it appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it."

In the case of *Hoyt v. Jeffers*, 30 Mich. 181, more than one building was burned by fire communicated by sparks from a mill chimney. As to the second building, the court held, "Even where such second building is at such a distance from the first that its taking fire from the first might not, *a priori*, seem possible, yet if it be satisfactorily shown that it did in fact thus take fire without any negligence of the owner, or any fault on the part of any third party, which could be properly recognized as the proximate cause, and for which he could be held liable, the party through whose negligence the first building was burned, can not on principle be held exempt from equal liability for the burning of the second."

These numerous citations show many phrases of this subject, and that each case must be determined by its peculiar facts, and so is largely within the province of the jury.

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Here explosives are averred to have been in Crawford's house, but if they ever exploded it is not averred that any injury came from such explosion. There is shown no *new* cause operating after the fire was carried from the chimney of the mill on its destructive mission. The demurrer was rightly sustained, and the court did not err in affirming the judgment.

Judgment affirmed.

44a 92
44a 449
45a 339
46a 287
46a 269

CUMMINGS v. KENT.

Bill of exchange—Contract of drawer—Presentation—Evidence of parol agreement.

1. By the act of drawing and issuing a bill of exchange, the drawer contracts that it will be accepted and paid according to its terms, and that if it is not he will pay it.
2. The liability of the drawer of a bill of exchange is fixed by the due presentation, demand, and notice of dishonor.
3. Evidence of a parol agreement, prior to or contemporaneous with the drawing and delivery of a bill of exchange, that the drawer is not to be liable as such, is inadmissible.
4. Cummings was indebted to Kent. Chamberlain was indebted to Cummings in the same amount and more. Cummings drew bills of exchange upon Chamberlain in favor of Kent for the amount of his indebtedness to the latter, which were accepted but not paid. There were due presentation, demand, and notice of dishonor. In an action by Kent upon the bills, Cummings answered that Kent agreed to take the acceptances in payment of his claim against Cummings, and that the latter drew the bills only for the purpose of assigning to Kent his claim against Chamberlain. Upon the trial Cummings offered to prove that prior to, and at the time of drawing the bills, there was a parol agreement that he was not to be liable thereon as drawer. *Held*: The evidence was properly excluded.

ERROR to the District Court of Hamilton county.

Bela C. Kent, the plaintiff in the original action, declared upon two bills of exchange of the tenor following:

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“\$1,565. NEW ALBANY, IND., *November 15, 1872.*

Ninety days after date of this, only of exchange, pay to the order of B. C. Kent, fifteen hundred and sixty-five dollars, without relief from valuation or appraisement laws, value received, and charge to account of

E. CUMMINGS.

TO MESSRS. CHAMBERLAIN, MATHERS & Co., *New Albany, Ind.*

Accepted, payable at 1st Nat. Bank, New Albany, Ind.
CHAMBERLAIN, MATHERS & Co.”

There were due presentation, demand, notice and protest.

The drawer and acceptors were made defendants.

E. Cummings, the drawer, and plaintiff in error, interposed the following as a defense:

“E. Cummings, defendant, now comes and for a defense says that he signed the two bills of November 15, 1872, in the petition set out, but under the following circumstances, to wit: that, being indebted to plaintiff on that date in the sum of \$3,014.65 for merchandise, plaintiff thereupon agreed to take the acceptances of Chamberlain, Mathers & Co., co-defendants herein, in payment of such indebtedness, and to release defendant from all liability for the same. Said defendants, Chamberlain, Mathers & Co., were at the time indebted to this defendant in said amount and more, and the defendant, in pursuance of said agreement, drew on Chamberlain, Mathers & Co., in favor of plaintiff, solely for the purpose of assigning and transferring so much of his claim against said Chamberlain, Mathers & Co. to plaintiff; and the transfer was put into the shape of bills or orders on the suggestion of the book-keeper of plaintiff solely to enable Chamberlain, Mathers & Co. to have a voucher when they should pay said bills against this defendant on account.”

On the trial Cummings offered to show by oral testimony:

“That on or prior to November 15, 1872, an arrange-

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ment was made between the plaintiff, defendant, and Chamberlain, Mathers & Co., that defendant, Cummings, should assign to plaintiff \$3,014.95 of his claim against Chamberlain, Mathers & Co., and that plaintiff would take that claim in settlement of so much of defendant's indebtedness to him, and release defendant from all liability for that indebtedness, and thereupon Kent did agree to release Cummings, and accepted Chamberlain, Mathers & Co., who thereupon agreed to pay said sum to the plaintiff.

"That, in pursuance of that agreement, the bills of exchange now sued on, were drawn up by the book-keeper of the plaintiff and signed by the defendant, but that the agreement between the parties was, that said papers should be used solely for the purpose of assigning defendant's claim to the plaintiff, and for the purpose of enabling Chamberlain, Mathers & Co. to have a voucher when they should pay these sums, against the defendant on account, but that the defendant was not to be liable on said bills of exchange as drawer."

The plaintiff below objected to this testimony. The objection was sustained and the testimony excluded. The only question before this court for consideration arises upon this action of the trial court. A judgment for the plaintiff was affirmed by the district court on error. To reverse this judgment the present proceeding is prosecuted.

John W. Herron, for plaintiff in error.

Jordan & Jordans, for defendant in error.

OWEN, C. J. If the trial court properly excluded the evidence offered by the defendant below to prove that it was agreed, at the time the bills of exchange in suit were drawn, that he was not to be liable thereon as drawer, the judgment below should be affirmed.

The real issue tendered by the answer was that Kent took the bills of exchange in payment of the debt of \$3,014.95 which was due from the defendant, Cummings, to him, and agreed to release the former from all liability for

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the same. A careful inspection of the answer fails to disclose any averment that Kent agreed to release Cummings from his liability as drawer of the bills, or that there was any agreement that the only purpose in drawing the bills was to effect an assignment of the debt. If we assume the facts alleged in the answer to be proved as fully as averred, they would still fall short of establishing a defense to the action on the bills of exchange. They may have been taken in payment of the account, and Cummings thereby released from all liability thereon; but the action was not upon the account, but upon the bills given for its payment. The evidence offered was properly excluded, as being irrelevant to the issues joined.

We do not find it necessary, however, to rest our determination of the case solely upon this ground. Assuming for the purposes of the case, that the issues were broad enough to invite an inquiry into the facts which were sought to be proved by the evidence offered, was it competent to establish such facts by oral testimony?

The liability assumed by the drawing of a bill of exchange is clearly recognized by the law. The mere act of drawing a bill imports the most certain and precise contract, for presumed adequate consideration, that the bill shall be accepted and paid, and that if it is not, the drawer will pay it. *Wood v. Surrells*, 89 Ill. 107; *Chitty on Bills*, 147. It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, can not be permitted to vary, qualify, or contradict, to add to or subtract from, the absolute terms of the contract. *Parson's Notes and Bills*, 501.

The evidence which the court excluded in the case at bar was offered for the purpose of proving that at the time of the drawing and delivery of the bills in suit, it was agreed between the payee and drawer that the latter should not be liable as such drawer. If this was not an attempt to contradict the plain terms of the contract as the law in-

terprets it, it is not easy to conceive of a case which would present such a question.

Morris v. Faurot, 21 Ohio St. 155, is cited to support the view contended for by Cummings.

This was a suit by the indorsee against the indorser of a promissory note. The defense was that the indorsement was not made in the regular course of business, but that the plaintiff had agreed with the makers to take up the note, and that "the indorsement was made with the express understanding and agreement that this indorsement was to be used by the plaintiff only as evidence to Cochran & McElroy that he had paid off their indebtedness on the note to the defendants, and that it was made for no other purpose whatever."

McIlvaine, J., says:

"That parol testimony is inadmissible to contradict or vary the terms of written instruments, and that the contract of an indorser of a promissory note, whether the indorsement be in blank or otherwise, is within the meaning of that rule, as general propositions of law are true, may be admitted for the purposes of this case. But the question in the case, as we understand it, was not as to the terms of the contract, or the nature or extent of the indorser's liability, but, *whether there was any contract at all*, out of which any liability could arise."

It will be seen that this case expressly recognizes the rule which the trial court, in the case at bar, applied in excluding the evidence offered "as to the terms of the contract, or the nature or extent of the liability" of the drawer.

Dye v. Scott, 35 Ohio St. 194, is relied upon as decisive of the case at bar, in that it establishes the admissibility of the evidence which the trial court excluded. The proposition declared by the court in that case is: "Oral testimony is admissible to prove that the indorser, as between himself and the indorsee, at the time of indorsing a note in blank, waived demand and notice." We are not called upon, nor have we any disposition, to question the entire soundness

of this proposition; and the language of Gilmore, J., which is relied upon by the plaintiff in error, must be read and construed in the light of the question before the court and not as declaratory of a rule which was not at all necessary to a solution of that question. The rule established by that case is supported by authorities which rigidly adhere to the principle which guided the trial court. 1 Parsons' Notes and Bills, 584; Daniel's Neg. Instruments, § 1093; Edwards' Notes and Bills, § 861; *Boyd v. Cleveland*, 4 Pick. 525; *Lane v. Steward*, 20 Me. 98; *Fuller v. McDonald*, 8 Greenl. 213.

Wood v. Surrells, 89 Ill. 107, is an instructive case, presenting striking analogies to the case at bar. One of several judgment debtors gave a bill of exchange on a third person, whose acceptance was procured in satisfaction of the judgment. It was held that evidence of a parol agreement at the time of the drawing of the bill, to release the drawer from all liability on the draft, was inadmissible. Here the judgment was paid by the drawing and acceptance of the bill; but evidence of a contemporaneous parol agreement that the drawer was not to be liable as such, was excluded.

It was further held in this case, that the liability of a drawer of an inland bill of exchange is fixed by presenting the draft on the day of its maturity, and notice of its dishonor. It was also held that: "The rule is familiar, that an agreement can not exist partly in writing and partly in parol, or, that verbal terms or conditions can not control the rights or liabilities of parties to commercial paper."

While there is not entire uniformity in the authorities upon the question, their decided weight will be found to support the principle that evidence is not admissible to prove a contemporaneous parol agreement that the liability of the drawer of a bill of exchange is not to be enforced. 1 Daniels' Neg. In., § 80; *Martin v. Cole*, 104 U. S. 30; *Bigelow v. Colton*, 13 Gray, 309; *Davis, Receiver, v. Randall*, 115 Mass. 547; *Bartlett v. Lee*, 33 Ga. 491; *Day v. Thompson*,

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65 Ala. 269; *Barnard v. Gaslin*, 23 Minn. 192; *Crocker v. Getchell*, 23 Me. 892; *Fuller v. McDonald*, 8 Greenl. 213; *Tankersley v. Graham*, 8 Ala. 247; *Stubbs v. Goodall*, 4 Ga. 106; *Wilson v. Black*, 6 Blackf. 509; *Holton v. McCormick*, 45 Ind. 411; *Stack v. Beach*, 74 Ind. 571; *Woodward v. Foster*, 18 Gratt. 200; *Barry v. Morse*, 3 N. H. 182; *Heav-
erin v. Donnell*, 7 Sm. & M. 244; *Heath v. Van Cott*, 9 Wis. 516. This is also the rule in England. *Hoare v. Graham*, 3 Campb. 57; *Abrey v. Cruz*, 5 Com. P. (L. R.), 37; *Bell v. Lord Ingestre*, 12 Q. B. 317; see also, *Forsythe v. Kimball*, 91 U. S. 291; *Specht v. Howard*, 16 Wall. 564.

Judgment affirmed.

THE STATE *ex rel.* ATTORNEY-GENERAL v. HAWKINS.

Constitutional law—Article 13, section 1—Act of April 3, 1885—Power of governor to remove police commissioners—Right of removed officer to hold over.

1. The act of the general assembly passed April 3, 1885 (82 Ohio L. 101-111), conferring certain corporate powers on cities of the first grade of the first class, is one of a general, and not of a special, nature; and, therefore, not in conflict with article 13, section 1, of the constitution, prohibiting the passage of special acts conferring such powers.
2. The power conferred on the governor of the state by section 1872 of the Revised Statutes, as amended by said act, to remove any members of the board of police commissioners, is administrative, and not judicial, in its nature; and, therefore, not in conflict with article 4, section 1, of the constitution, conferring judicial power on the courts of the state.
3. Where charges, embodying facts that, in judgment of law, constitute official misconduct, are preferred to the governor, of which notice is given the members charged, and he, acting upon the charges so made, removes them from office, his act is final, and can not be reviewed, or held for naught in this court, on a proceeding in *quo warranto*, whether he erred or not, in exercising the power so conferred on him.
4. A police commissioner, removed from office by the governor for official misconduct, as provided in section 1872 of the Revised Statutes, as amended April 3, 1885, does not, under section 1542 of said statutes, hold over until his successor is elected and qualified. When removed from his office, he ceases to be an officer, and can not, therefore, hold over as such.

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QUO WARRANTO.

The information states in substance, that the defendants, Morton L. Hawkins, Julius Reis, and Will. A. Stevens, were, on April 4, 1885, appointed police commissioners of the city of Cincinnati by its board of public works, under an act of the general assembly of the state passed April 3, 1885 (82 Ohio L. 101); that they entered upon their duties as such, and continued to act in that capacity until February 3, 1886, at which time they were duly removed by the governor of the state; and that, notwithstanding such removal, they have unlawfully continued to exercise the power and authority incident to the office of police commissioners; and, therefore, the relator asks for a judgment of ouster.

The defendants Hawkins and Reis have filed a joint, and the defendant Stevens a separate, answer.

Each answer admits the appointment and removal, and that defendants continue to exercise the powers of police commissioners, but denies that they were lawfully removed, and also the power of the governor to remove them; and then sets forth the proceedings before the governor on which the removal was made.

These were in substance as follows: On January 24, 1886, charges of official misconduct were preferred against them to the governor, by certain citizens of Cincinnati, acting as the *ad interim* committee of the committee of one hundred in said city, specifying as grounds of the charges, the appointment of a large number of persons to places upon the police force of the city, who by reason of their known character and habits, were wholly unfit for the places to which they had been appointed upon the force. In the appointment of some of these, to wit, Michael Mullen and John Tosney, Stevens did not concur; but it was charged that he did in the appointment of a large number, wholly unfit to act as police officers, some of whom are gamblers, some of whom have served terms in the work-house, in the penitentiary, in the jail, have been inmates of the house

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of refuge, some of whom have been keepers of houses of prostitution, and a number of whom have been discharged by said board for drunkenness and other offenses repeatedly committed, and have been reinstated notwithstanding said offenses, specifying the names. Various other specifications of official misconduct were also made.

That thereupon notice was given each of them by the governor, of the filing of the charges, and a copy of the same: and that he had appointed Wednesday, February 3, 1886, for the hearing of the same at his office in Columbus, at the hour of ten o'clock A. M., upon such testimony in support of or against said charges, as might be offered; and that, if they desired to answer the charges, they could do so on or before Saturday, January 30, 1886.

That, on February 1, 1886, counsel for Hawkins applied to the governor for an extension of time to answer, by reason of his illness, filing the affidavit of Hawkins to that effect, and (Reis not having answered at the time fixed by the governor) and made an order that he should answer on February 3, and stated that he would at that time pass on the application of Hawkins for further time to answer, and fix a time for the trial of said cause. That Reis filed his answer on February 3, as had been fixed; Hawkins filed no answer, but his counsel informed the governor that he was unable to do so, by reason of his continued illness, and which was true; that thereupon, on the same day, February 3, the governor, without further notice to either of the parties, made an order removing them from office.

The order was as follows:

“OFFICE OF THE GOVERNOR, *February 3, 1886.*

“In the matter of the charges and specifications against Morton L. Hawkins, Julius Reis and Will. A. Stevens, police commissioners of Cincinnati: Ordered by the governor this third day of February, 1886, certain charges and specifications of official misconduct having been preferred against M. L. Hawkins, Julius Reis, and W. A. Stevens, police commissioners, which charges and specifications

were duly filed in this office on the 25th day of January, and a copy of said charges and specifications having been served on each of said commissioners on January 27th, together with a notice of the filing of the same in this office, and that they (the said commissioners) would be given until January 30th to file answers or any other pleadings they might desire to make to said charges and specifications, and that the same would thereafter be heard at this office on February 3d; and said Will. A. Stevens having filed an answer, and said Morton L. Hawkins and Julius Reis having applied on that day for further time, to wit, until the 3d day of February, in which to file answers and for a postponement of hearing until the 10th of February, and having filed, in support thereof their respective affidavits.

“After hearing the said application and further time for filing answers having been granted, and further hearing of the application for postponement until the 10th, for hearing, said charges having been continued until after the filing of their answers on the 3d day of February, and said matter coming on this day to be further considered, and it appearing that said Julius Reis has filed his answer to said charges, and that Morton L. Hawkins has failed to do so, and it further appearing from examination and consideration of said charges and specifications and answer thereto of Julius Reis, and from the affidavit of M. L. Hawkins that they, the said Reis and Hawkins, do each admit the appointment by them to a position on said police force of Mike Mullen, and also his subsequent promotion by their votes, as alleged in the charges aforesaid, and the said Mike Mullen being known to the governor as a man of notorious bad character and wholly unfit to hold any position on the police force, and it further appearing from the answer of W. A. Stevens that James S. White and others known to the governor to be men of notorious bad character and wholly unfit to hold any position, are holding positions on the same force, and are continued there by his authority, consent and approval, and it being in the judgment of the governor gross official misconduct to appoint and continue

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on said force such unfit and improper men, and this official misconduct being as aforesaid admitted by each and all said police commissioners in manner and form as above stated, and no investigation or hearing, and no exercise of judicial power being necessary to the finding and establishing of the fact of said official misconduct, it is considered by the governor that the applications for further delay should be and hereby are overruled, without regard to other charges and specifications.

"Said Morton L. Hawkins, Julius Reis and Will. A. Stevens should each and all of them be and they are hereby removed from their said office of police commissioners of Cincinnati.

"In testimony whereof I have hereunto set my name and great seal of the State, to be affixed, at the city of Columbus this 3d. day of February 1886.

[Signed]

J. B. FORAKER,
Governor of Ohio."

Stevens had filed his answer to the charges on January 30, 1886, the day fixed by the governor in his notice to the commissioners of the filing of the same.

The answer of Reis, as, also, that of Stevens, deny the truth of all the charges made to the governor in manner and form as stated; as does also, the affidavit of Hawkins, filed for an extension of time in which to answer. They all do, however, admit certain of the statements made against them in the matter of the appointments made by them, but with such qualifications as, in the judgment of each, removed any ground for the charges made against them of official misconduct.

Thus, replying to the charges relative to the appointment of Michael Mullen, who had been convicted of a crime and pardoned by the President of the United States, Reis says: "Your respondent acting upon what he supposed to be the law, to wit, that one having been pardoned of an offense of which he might have been found guilty, was restored as fully as if there had been no conviction; and that

when Michael Mullen was pardoned, presumably for good cause by the president, respondent had the right to consider said Mullen, in his official relations, as if the offense for which he was convicted had never been charged against him."

As to John Tosney, who had been dismissed from the force by the unanimous vote of the board of police commissioners, for *drunkenness*, he avers "that he voted for the reinstatement of said Tosney, because he was informed, and believed at the time of said reinstatement, that said Tosney had reformed and entirely ceased from drinking; and that he did not know that it was an offense against the law to reinstate one upon the police force of the city of Cincinnati who had been suspended because of drunkenness; that he supposed he had a right to be charitable toward those who were simply guilty of a want of sobriety, a very common occurrence."

Hawkins, in his affidavit filed for an extension of time by the governor, says "that affiant voted for the appointment of Mr. Mullen, and for the appointment of Mr. Tosney, and that his act was done for the best interest, as he understood it, of the police department of the city of Cincinnati."

Stevens shows, in his answer, that he did not vote for many of the more objectionable appointments. As to James White, for whom he did vote, and who had been convicted of an offense against the election laws, and pardoned by President Hayes, before the expiration of his time, he says "he was not aware of the fact at the time of the appointment; that he had served long on the force, was a good officer," and that "it would hardly appear to him the proper thing to revive a matter which had grown gray with age," . . . and that "this respondent does not understand it to be his duty to never forgive, or relent, toward one who has at one time offended against the law."

The relator demurred to the joint answer of Hawkins and Reis, and also to the separate answer of Stevens, for the reason that neither states facts sufficient to constitute a

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defense to the action; whereupon the case was submitted to the court upon the petition, the answers, and the demurrers thereto.

Thomas McDougall, with whom was *Jacob H. Kohler*, attorney-general, for plaintiff.

1. The governor had power to remove the defendants under section 1872 of the Revised Statutes (82 Ohio L. 102), which provides: "and for official misconduct any commissioner may be removed by the governor." The power so conferred is a part of the administration of the police department of the government.

That the general assembly had authority to confer this power in the absence of constitutional inhibition, will not be questioned.

2. It is claimed, however, that the power to hear and determine what is official misconduct, and to pronounce a judgment of removal thereon, is judicial power which, under section 1, article 4, of the constitution, is exclusively vested in the courts.

But the power conferred upon the governor is not judicial. *State v. Harmon*, 31 Ohio St. 250; *Donahue v. The County of Will*, 100 Ill. 94; *Dougan v. District Court*, 22 Am. Law Reg. [N. S.] 528.

If the claim of defendants is correct, that the exercise of the power of removal of officers administering public trusts is judicial, and can not be exercised and the offender removed until after a trial has been had in a judicial forum, finding the official misconduct to exist, then it would be possible to administer government in its various departments. The humblest official in office, whether a patrolman, stationhouse-keeper, janitor of a state-house, or any officer appointed in pursuance of an act of the legislature, holds his office by the same title and the same authority as these defendants do. How then could government be administered, if the removal of all such officers, such public servants, could only be effected by the courts, and that only after a judicial finding of official misconduct? This

other difficulty is also presented by the claim of the defendants. There are many cases of official misconduct which are not offenses under the law, and for the trial of which by the courts no provision has been made by law. How then is a judicial finding of official misconduct in such cases to be made in the absence of a statutory provision making such cases of official misconduct an offense which the courts may try?

If, however, the court should hold the grant of power conferred upon the governor to be unconstitutional, then we claim that the whole act is void for the reason that it is improbable that the general assembly would have passed the act without the provision in question. *State v. Pugh*, 43 Ohio St. 98; *State v. Sinks*, 42 Ohio St. 345.

3. We claim that, if the power exists in the governor to remove for official misconduct, if the law has conferred the authority on him to try and determine what official misconduct is, and to pronounce judgment accordingly, then the only inquiry which this court can make in this case is :

“Do the charges presented and set forth in full in the answers of defendants, if true, make a case of official misconduct justifying the removal of the defendants?”

If those charges do make such a case, then this court can not enter into and inquire what hearing, if any, the governor gave these defendants. What evidence, if any, he had before him, on which he based his judgment of removal. In this collateral proceeding, the only questions upon which this court can pass are: Had the governor authority? And, in pursuance of that authority, did he make a judgment of removal? If so, then all the averments as to a failure to hear testimony, and a failure to permit counsel for defendants to be heard, are irrelevant, and can not be entertained to affect or impeach collaterally the power thus conferred on the governor, and its exercise by him. *State v. Chase*, 5 Ohio St. 528; *State v. McGarry*, 21 Wis. 496; *Keenan v. Perry*, 24 Tex. 253; *Patten v. Vaughan*, 39 Ark. 211; *State v. Doherty*, 25 La. Ann. 119;

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State v. Barrow, 29 La. Ann. 243; *State v. Lamantia*, 33 La. Ann. 446; *People v. Stout*, 19 How. Pr. 171; *Donahue v. County of Will*, 100 Ill. 94; *State v. Prince*, 45 Wis. 610; *Hogan v. Carberry*, 4 Week. Law Bull. 113; *Hogan v. Sutton*, 4 Week. Law Bull. 609; *Weber v. Bishop*, 4 Week. Law Bull. 779; *People v. Bearfield*, 35 Barb. 254.

4. The law under which the defendants were appointed is a special act, relating alone to Cincinnati, conferring corporate powers upon that city, and hence is in conflict with section 1, article 13, of the constitution. *State v. Pugh, supra*; *State v. Constantine*, 42 Ohio St. 437.

Hoadly, Johnson & Colston, for defendants Hawkins and Reis.

The general assembly can not give the governor the power to remove, for official misconduct, officers not appointed by him.

The only cases on the subject, in which this question is discussed at all, agree that this is a judicial power which can not be conferred upon the governor.

The power to remove an officer for official misconduct could, at common law, only be exercised by the courts. The method of removal was by *scire facias*, out of chancery. At common law this was, therefore, judicial power. 3 Black. Com., ch. 17, 258; *State v. Pritchard*, 36 N. J. Law, 106-113.

It follows that without a proper provision in the constitution to that effect, this power can not be exercised by the executive or legislative department, because the constitution has conferred it on the judicial department. *Page v. Hardin*, 8 B. Mon. 672; *State v. Pritchard, supra*; *Hill v. State*, 1 Ala. 559; *Honey v. Graham*, 39 Tex. 1; *Dullam v. Willson*, 53 Mich. 392; *Field v. People*, 3 Ill. 79.

The cases of *People v. Stout*, 19 How. Pr. 171; *People v. Whitlock*, 92 N. Y. 191; and *Bergen v. Powell*, 94 N. Y. 591, turn upon the special language of the statutes and of the constitution of New York.

If the power of removal belonged to the governor, he

was bound to hear testimony and give the persons accused an opportunity to be heard by witnesses and counsel, and could not decide on knowledge he might suppose he possessed, or information privately coming to him. As to this the current of authority is uniform. *Ex parte Ramshay*, 18 Q. B. 190; *Osgood v. Nelson*, 5 Eng. & Ir. App. 648; *Commonwealth v. Slifer*, 25 Pa. St. 28; *Dullam v. Willson*, *supra*.

Even if lawfully removed by the governor, the police commissioners must remain in office until their successors have been elected and qualified, as provided by section 1870 of the Revised Statutes. This is required by section 1542, the express object of which is to prevent a continuing vacancy in any municipal office.

T. C. Campbell and *B. Bettman*, for defendant, Will. A. Stevens.

The act of removing an officer on a charge of "official misconduct" is a judicial decision. It includes questions of fact and the application of rules of law. Hence, the statute endeavors to invest the governor with power which he is constitutionally incapable of exercising. It is therefore void.

But were this a valid statute, it would require a legal exercise of the power conferred. Even if there were jurisdiction, there must have been a legal proceeding.

As in every other judicial proceeding, notice must be served on the accused, an opportunity given him to answer, his liability must be fixed by evidence, and he must have the right to cross-examine. The judge may have jurisdiction, but can render no judgment until the legal prerequisites to judgment are observed.

To these propositions counsel cited many of the cases referred to by counsel for the other defendants, and in addition, *Hogan v. Carberry*, 4 Week. L. Bull. 117; *State v. Bryce*, 7 Ohio, pt. 2, 84.

MINSHALL, J. The decision of the case involves the de-

termination of a number of questions we will now proceed to consider.

1. It is claimed by the relator that the statute under which the respondents were appointed and claim the right to act as police commissioners of the city of Cincinnati, passed April 3, 1885 (82 Ohio L. 101-111), is a special, and not a general one, conferring corporate power, and so in conflict with section 1, article 13, of the constitution of the state, prohibiting such legislation.

But it is now too well settled by the decisions of this court to be called in question, that legislation may be adapted to the different classes into which the municipal corporations of the state have been classified by the Revised Statutes, Tit. 12, Div. 2, ch. 1, without violating the provision of the constitution just referred to. The distinction is this, that a law applying to a certain class of cities, fixed by previous legislation, into which other municipal corporations may enter, and from which they may pass into other classes, by increase of population, is not special but general, since the grade of any particular city is not designated by the act, but depends upon its growth in population, as it may, by such growth, pass from one grade or class to another. *State v Pugh*, 43 Ohio St. 98, and the cases cited by Owen, J., delivering the opinion of the court, at p. 112.

The act under consideration in that case was held invalid, because it was not merely made applicable to the grade and class to which Columbus then belonged, but because it was the only city in the grade and class to which it then belonged, or could belong in the next five days from the passage of the act, the time in which the powers conferred were required to be exercised; after the lapse of that time neither Columbus, nor any other city of its grade, could have exercised the powers conferred by the act.

To hold this statute invalid, for the reason stated, would be to deprive, not only Cincinnati, but every city of the state of any system of municipal government whatever; as all statutes conferring corporate power upon the municipalities of the state apply, in terms, to cities of certain

grades and classes. There should be something more than a mere question as to the validity of a statute, to warrant a court in a holding that must lead to such serious consequences.

2. In answer to the information, it is claimed by the respondents, that the governor had no power to remove them; and, again, that if he had, it was not properly exercised.

The first claim is upon the assumed ground, that the power conferred on the governor by the statute to remove any of them for official misconduct, is judicial in its nature, and, though conferred by the act, can not be exercised, as the judicial power of the state is, by section 1, article 4, of the constitution, conferred upon the courts of the state only.

This is not to be regarded as an entirely new question. It has been much discussed by courts and writers, without being able to formulate any general rule upon the subject. What is judicial power can not be brought within the ring-fence of a definition. It is undoubtedly power to hear and determine; but this is not peculiar to the judicial office. Many of the acts of administrative and executive officers involve the exercise of the same power. Boards for the equalization of taxes, of public works, of county commissioners, township trustees, judges of election, viewers of roads, all, in one form or another, hear and determine questions in the exercise of their functions, more or less directly affecting private, as well as public rights. It may be safely conceded, that power to hear and determine rights of property and of person between private parties, is judicial, and can only be conferred on the courts (*Merrill v. Sherburne*, 1 N. H. 199.) But such a definition does not necessarily include this case. The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust to be exercised for the benefit of the public. Such salary as may be attached to it, is not given because of any duty on the part

of the public to do so, but to enable the incumbent the better to perform the duties of his office by the more exclusive devotion of his time thereto. Official duties may, and in some instances are, imposed and required to be performed by the citizen, without any compensation whatever, where there is no constitutional provision requiring it. A public office and its creation is a matter of public, and not of private, law. The legislature had the power to provide for the creation of a board of police commissioners for cities of the grade and class of Cincinnati. This power carried with it, as an incident of its exercise, the power to provide a mode of removal, unless restrained by some provision of the constitution, to the mere act of providing for the appointment of members of the board, which is not the case. The organization and government of cities is left, by the constitution, to the general assembly, with the requirement (art. 13, § 6) that it shall, by general laws, provide therefor; and the entire system of municipal government in this state has, in the exercise of this power, been created by the legislature. Not one of the officers of a city or village has any recognized existence in the constitution. It is different as to county and township officers. See article 10, relating to county and township officers. And here it will be observed that section 6 of this article provides that: "Justices of the peace, and county and township officers may be removed in *such manner* and for *such cause* as shall be prescribed by law." There is no requirement that the power of removal, that may be prescribed by law, shall be conferred on the courts, for the legislature is to provide the manner, as well as the cause of removal. In the exercise of this power, the legislature has provided for the removal of county treasurers by the county commissioners (§§ 1126 and 1127, Rev. Stats.). The power has been frequently, and wisely, exercised; and, so far as we can learn, has never been questioned in the courts. This section does not in terms extend to officers of municipal corporations; and, for the obvious reason that, as already stated, such officers have no recognized existence in the

constitution. They are to be created and provided for by the legislature. Now, is there any room for doubt that the legislature may, in providing for the organization of cities and villages, adopt the policy of the constitution contained in this section, in providing for the removal of such municipal offices as it may, in the exercise of the power granted, provide shall be elected or appointed by cities and villages. Surely it may be inferred that, if the removal of a county or township officer for cause, does not involve the exercise of judicial power, within the meaning of section 1, article 4, and that it may be reposed elsewhere than in a court, there is the fullest warrant for saying, that the same is true as to the removal of municipal officers, created by the legislature.

The view here taken will be found sustained, not only by the decisions of this court, but also by those of other states of weight and respectability.

In *The State ex rel. v. Harmon*, 31 Ohio St. 250, the nature of judicial power was considered by Judge White. The case involved the validity of the power conferred by statute upon the senate to hear and determine the contested election of a judge. It was argued with much ability and earnestness by counsel for the respondent, that such power could not be conferred on that body, citing and relying on section 1, article 4, in connection with section 32, article 2, of the constitution, the former conferring judicial power on the courts, and the latter prohibiting the exercise, by the legislature, of any such power not expressly conferred. But the court held that the power conferred on the senate was not judicial power within the meaning of section 1, article 4. The following is a part of the language used by Judge White in delivering the opinion of the court: "That the senate is not a court established under the judicial article of the constitution, is plain. Hence, if the trial of contested elections is necessarily the exercise of judicial power, within the meaning of that article, authority to try such cases can not be conferred upon the senate.

"The distribution of powers among the legislative, ex-

ecutive, and judicial branches of the government is, in a general sense, easily understood; but no exact rule can be laid down, *a priori*, for determining, in all cases, what powers may or may not be assigned by law to each branch. . . . "What constitutes judicial power, within the meaning of the constitution, is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution.

"Whether power, in a given instance, ought to be assigned to the judicial department, is ordinarily determinable from the nature of the subject to which the power relates. In many instances, however, it may appropriately be assigned to either of the departments.

"It is said authority to hear and determine a controversy upon the law and fact is judicial power.

"That such authority is essential to the exercise of judicial power, is admitted; but it does not follow that the exercise of such authority is necessarily the exercise of judicial power.

"The authority to ascertain facts, and to apply the law to the facts when ascertained, appertains as well to the other departments of the government as to the judiciary. Judgment and discretion are required to be exercised by all the departments.

"The exercise of the power of eminent domain vested in county and township boards and in corporations, is not the exercise of judicial power, within the meaning of the constitution; while the exercise of the same power by the courts, if vested in them, would be judicial."

He then cites *In the matter of Cooper*, 22 N. Y. 84, and quotes the language used by Selden, J., which is much to the same purport.

In *Hambleton v. Dempsey*, 20 Ohio, 168, the proceedings of a board of equalization were before the court; and, though the exercise of its power "to equalize the assessments of all personal property" necessarily involved the

power of hearing and determining, the validity of the power reposed in such boards was not questioned.

A different view has been taken by the courts of some of the states. *State v. Pritchard*, 86 N. J. Law, 101; *Page v. Hardin*, 8 B. Mon. 672; *Commonwealth v. Slifer*, 25 Pa. St. 28; and *Dullam v. Willson*, 58 Mich. 392. But these decisions have, as a rule, proceeded upon the ground, that an incumbent has a property in his office, and that he can not be deprived of his right without the judgment of a court. This view finds support in the doctrines of the common law, which regarded an office as a hereditament, but has no foundation whatever in a representative government like our own.

The doctrine is opposed to the view taken by other courts of equal learning and ability. *State v. McGarry*, 21 Wis. 496; *State v. Prince*, 45 Wis. 610; *Keenan v. Perry*, 24 Tex. 253; *State v. Doherty*, 25 La. Ann. 119; *Taft v. Adams*, 3 Gray, 126; *Ex parte Wiley*, 54 Ala. 226; *Thompson v. Holt*, 52 Ala. 491; *State v. Frazier*, 48 Ga. 137; *Dougan v. District Court Lake County*, 22 Am. L. Reg. (N. S.) 528; *Donahue v. County of Will*, 100 Ill. 94; *Patton v. Vaughan*, 39 Ark. 211.

In *Donahue v. County of Will*, *supra*, which was very similar in its facts to this one, the judge delivering the opinion says: "It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public benefit. It would be a mishomer and a perversion of terms to say that an incumbent owned an office, or had any title to it."

The question as to whether an officer could be removed for misfeasance or malfeasance without a judicial sentence, was fully examined upon principle and authority, and no doubt was entertained but that he could; and it was there held that an act which authorizes county boards to remove

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county treasurers for a neglect or refusal to render an account, etc., is not in contravention of the constitution of that state, and is a valid law.

In *State ex rel. Flinn v. Wright*, 7 Ohio St. 333, it is held that the general assembly can vacate the office of a judge, created by it, before the expiration of the term; and that the right of the incumbent to the salary ceased with the vacation of the office, and a writ of mandamus to compel the auditor to draw a warrant therefor was refused—a result that could not have been reached consistently with the idea that the relator had a property in his office.

It is claimed that a distinction should be taken in the cases where the power of appointing and removing are reposed in one and the same person, and where it is reposed in different persons. We are aware that this distinction exists in the facts of some of the cases, but we are not aware that any distinction in principle has been based upon it. Whether the person removed was or was not appointed to his office by the official that is vested with the power to remove, can not, as we see, change the essential character of the power of removal.

It is also claimed, that a distinction should be taken between the case where an appointment to an office is made to be held by the appointee at the pleasure of the appointing power, and, where it is with a provision for removal for misconduct. But there is none in principle, so far as the right to remove is concerned. The office, in either case, is held subject to the terms upon which it was created, and the mode of removal prescribed. As it may be so created as that the incumbent shall hold at the pleasure of the appointing power, then, for a stronger reason, the appointment may be made to depend upon removal for cause, irrespective of where the power to remove may be lodged. The manner of filling and vacating the office being unaffected by constitutional provisions, the manner prescribed by the legislature must prevail in either case. It is a strange sort of logic which reaches the result, that the of-

office may be accepted in the manner prescribed by the legislature, and the mode of removal rejected.

3. The next question is as to whether the exercise of the power can be reviewed in this court. As the governor had the power to remove, and as in exercising it he did not act in a judicial capacity within the meaning of the constitution, it would seem to follow as a corollary, that the exercise of the power by him, can not be inquired into in this court, and held for naught in a proceeding in *quo warranto*, simply because he may have erred in exercising the power reposed in him by the statute. The only question that this court can consider, is, whether charges involving official misconduct were preferred, of which the parties had notice, and that he acted upon these charges, and removed the respondents, for the reasons stated in the charges. The law as to this question is, as we think, accurately stated by Dixon, C. J., in *State v. McGarry*, *supra*: "The cause must be one which touches the qualifications of the officer for the office, and shows that he is not a fit or proper person to perform the duties; and when such a cause is *assigned*, the power to determine whether it exists or not is vested exclusively in the board, and its decision upon the facts can not be reviewed in the courts. The only question of judicial cognizance is as to whether the board has kept within its jurisdiction, or whether the cause *assigned* is a cause for removal under the statute." See also the following cases cited, *supra*, *State v. Prince*, *Keenan v. Perry*, *Ex parte Wiley*, *Thompson v. Holt*, *State v. Frazier*, *State v. Doherty*, *Donohue v. County of Will*, and, also, the case of *State v. Chase*, 5 Ohio St. 528.

The cases taking a different view are, as a rule, those holding that the power to remove is a judicial one, and can only be exercised by the courts. Thus, in *Dullam v. Willson*, *supra*, it is said to be "undoubtedly true that no court can review the lawful discretion of any body that is not a court, and that the executive stands in this respect on the same footing with all other persons and bodies." The decision of the court was placed on the ground that the

power the governor had exercised—the removal of a trustee of a deaf and dumb asylum—was judicial in character, and could not lawfully be conferred on him.

It may be admitted that such power is liable to abuse. "Yet," as said by Walker, J., in *Donahue v. County of Will*, "this is not a legitimate argument against delegating power to tribunals to be exercised for governmental purposes." For an abuse of such power, the remedy is, either to the people in the election of a successor to the officer abusing the power reposed, or, when the removal is characterized by circumstances of flagrant abuse, he may be impeached and deprived of his office.

The charges that were presented to the governor, and upon which he acted in removing the defendants, were such as to leave no question but that they amounted to official misconduct, and for which they should have been removed, if found true. It was charged that they had appointed a large number of persons to places on the police force wholly unfit to act as police officers, some of whom are gamblers, some have served terms in the workhouse, in the penitentiary, in the jail, have been inmates of the house of refuge, some have been keepers of houses of prostitution, and a number have been discharged by said board for drunkenness and other offenses repeatedly committed, and have been reinstated notwithstanding said offenses. It is true these charges are denied in manner and form, but whether true or not was for the governor to determine. This court can only pass upon the sufficiency of the charges as a matter of law—not upon their truth. But it may be observed that while each of the defendants denied the charges in manner and form, yet each does admit the keeping of persons on the police force who had been convicted of offenses disqualifying them for such positions, but extenuate the charge by the claim that it was a proper thing to encourage such persons; and as to Mullen and White, each of whom had been pardoned before the expiration of their terms of imprisonment, they claim, that they were restored thereby to citizenship, and entitled to the same

confidence as if they had never been convicted. But conceding all that can be said of the general duty of encouraging and assisting those who have erred, yet this duty assumes a very different aspect in the case of a citizen clothed with the public duty of selecting suitable persons to preserve the peace and good order of a community. The charity of forgiveness may not always consist with the sterner duties exacted by the responsibility of his position. [Whatever the theory of the law may be as to the effect of a pardon, it can not work such moral changes as to warrant the assertion that a pardoned convict is just as reliable as one who has constantly maintained the character of a good citizen. It is a perversion of language to give to the views expressed by Judge Okey in *Knapp v. Thomas*, 39 Ohio St. 377, such a construction. He never meant any thing of the kind. So that whilst we rest the decision upon the ground already stated, that the action of the governor in removing the defendants, can not be reviewed in this court, yet the facts disclosed by the answers warrant the statement that the charges were at least in part true, and might be regarded as furnishing sufficient ground for the removal of the defendants.

4. But it is also contended that, under section 1542 of the Revised Statutes, the commissioners, though lawfully removed by the governor under the provisions of section 1872, must remain in office until their successors are elected and qualified. We can not adopt this view. It is difficult to understand how an officer, who has been removed from his office for official misconduct, can hold over for any purpose. When removed he ceases to be an officer, and there are no powers left in him as an officer upon which to hold over.

The demurrers to the answers are sustained; and the cause having been submitted to the court upon the pleadings and demurrers, judgment of ouster is rendered against the defendants.

Judgment of ouster.

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FOLLETT, J., dissenting. My reasons for urging the *constitutionality* of this police statute are sufficiently set forth in the opinion in the case of *The State ex rel. Attorney-General v. Hudson, infra*, 137, but I dissent from the holding of the majority of the court on other propositions here, viz.:

That the governor had ample power to pass upon the official conduct of the board of commissioners, and to remove them from office if he deemed them guilty of "official misconduct;" and that the power of removal was properly exercised here.

I shall set forth some reasons for my dissent. The facts should be known.

On April 4, 1885, the board of public works of the city of Cincinnati appointed as a board of police commissioners of that city Will. A. Stevens for the term of one year, Julius Reis for the term of two years, and Morton L. Hawkins for the term of three years, from the eighth day of April, 1885. They entered upon the discharge of their duties, and performed the same until February 3, 1886, when, it is alleged, they were removed by the governor. They denied the validity of the removal and retained their offices, and this action is here for a judgment of ouster. The defendants answer, and the relator by his demurrer admits the answers and allegations therein to be true.

These show that, on January 24, 1886, charges were preferred against all the police commissioners. These charges set forth their appointment, and that they had vested in them all police powers and duties connected with the police force of the city of Cincinnati, and that for official misconduct they or either of them could be removed by the governor. They charge, as official misconduct, that, on August 25, 1885, they made an order on their minutes "that Michael Mullen be reinstated to his position of lieutenant, to take effect at once," Hawkins and Reis voting aye, and Stevens voting nay; and that, October 2, 1885, by the same vote, Mullen was promoted to be inspector of police; that Mullen, at the October term, 1884, of the circuit court of

the United States, held in Cincinnati, was indicted for preventing certain citizens from voting at an election for representatives in congress, such persons being entitled to vote at that election; that such offense was committed while Mullen was lieutenant of the police force of the city of Cincinnati, and was in charge of the Hammond street station-house in the city; that he was found guilty, and he was sentenced to be imprisoned in the jail of Hamilton county for twelve months, and to pay the costs of prosecution.

No part of the testimony is given, but they contain what purports to be certain remarks of the judge. The charges averred that the board of commissioners knew what Mullen had done, and that he was so found guilty and sentenced.

They further charged that, on October 17, 1885, by the same vote, the board appointed one John Tosney as a patrolman of the force; and that, when appointed, he had been arrested upon the charge of stuffing the ballot-box and violating his duties as judge of election of precinct A of the Fourth ward, October 13, 1885, and that the board knew the same; and that the board unanimously, on August 14, 1885, had dismissed Tosney from the force for drunkenness.

They also charge that, October 17, 1885, the board suspended, and on October 27, 1885, dismissed from the force one Herman F. Newman, and allege that his dismissal was without cause and in violation of official duty; and that he was dismissed because he had discharged his duty and had arrested Tosney.

The charge states that the police commissioners have appointed and kept on the regular police force a large number of men wholly unfit to act as police officers.

They charge that, on October 13, 1885, and for some days prior thereto, the board appointed a large number of special policemen, who were wholly unfit to act as such officers, as was well known to the board, and name a large number of men.

That there was an organization in the city of Cincinnati to secure an honest and fair election, known as the committee of one hundred, and this committee, before the election of October 13, 1885, caused warrants to be issued for violations of the registry law and other offenses, and a subcommittee of that committee waited on the police commissioners and told them of the same and urged their arrest, and that they willfully refused to discharge their duties and arrest such accused persons; and that the board failed to take steps to secure an honest election.

The charges thus conclude: "Wherefore your petitioners ask that said Morton L. Hawkins, Julius Reis, and Will. A. Stevens, be notified of the charges filed herein against them for official misconduct; that they be afforded time to file any answer they may desire to make to said charges; that a time be set for a hearing of the same; and that your excellency may take such action in the premises as the testimony in the case may warrant; and that, if said police commissioners be found guilty of the charges herein, they may be removed from their said office."

These charges were signed by an *ad interim* committee of the committee of one hundred, January 23, 1886.

It is plain to see that this committee thought the governor possessed sufficient *judicial* power to try these charges, and that a *decision* as to whether or not either of the police commissioners was guilty of *official misconduct* would depend upon the *testimony* in the case.

On January 25, 1886, a copy of these charges was served upon each of the police commissioners, and February 3, 1886, at the governor's office in Columbus, was set "for the hearing of the same at this office upon such testimony as may then be offered in support of or against said charges."

Hawkins was too sick to attend to business and asked for time to answer. Reis and Stevens each filed a separate answer. Reis admitted that he was police commissioner, and he denied the governor's jurisdiction over the matters charged, and he denied "each, all and every statement set

forth in said charges," and he denied that he had been guilty of any official misconduct or had failed to discharge the duties of his office or had improperly discharged the duties imposed upon him.

He admitted that he voted for the appointment and promotion of Michael Mullen, that Mullen was indicted and convicted as charged, and he averred that Mullen, prior to the charges for which he was indicted, had been a faithful and efficient officer of police, and that he, Reis, was informed at the time of the conviction of Mullen that the facts were as follows: that Mullen in the discharge of his duty as lieutenant of police, having received an order from the mayor to arrest all suspicious persons, and having received information that a large body of persons were congregated at certain places in the city of Cincinnati on the evening before election day, not legal voters in the city, but non-residents of the county and state; who had come to Ohio for the very purpose of violating the election laws to be held upon the following day; and in pursuance of the information so brought to him, and in obedience to the order so received from the mayor, arrested a large number of said alleged illegal voters in good faith and for the purpose of carrying the election laws of Ohio into effect, and to prevent illegal voting. That inadvertently in making the arrest of so large a number of persons, there were included therein three or four persons who were legal voters, found in the company of the assemblage of persons so congregated together for the purpose of violating the law, and that whilst technically guilty of the crime charged against him in the court, he was innocent of all purpose of practicing a fraud upon the rights of any one entitled to vote.

That after conviction and he had served a portion of his sentence he received from the president of the United States, a full and complete pardon for the offense charged against him. And that he, Reis, believed such a pardon blots out the offense so that it can not be imputed to the one pardoned. And he referred to *Knapp v. Thomas*, 39

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Ohio St. 381, where Okey, J., says, "by force of the pardon . . . he was restored to all his civil rights and privileges. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. *Exp. Garland*, 4 Wall. 333, 380. It obliterates, in legal contemplation, the offense itself." That he, Reis, believed he should so act, and that in view of the previous good character of Mullen in that community and in view of his efficiency as a police officer, etc., he voted as he did. That since then Mullen so conducted himself in his office and so effectively performed his duties to the satisfaction of the citizens of Cincinnati, that he voted for his promotion, and respondent believes Mullen has ever since conducted himself as an orderly, well-behaved and competent police officer; and that in voting for Mullen he did so with the single and sole purpose of performing his duty as he was bound in law to do.

As to Tosney he denied that he knew of any thing against him, except at one time drunkenness, when he was dismissed; and that before he was reappointed he heard he had reformed, and his reappointment was asked for by many respectable and influential citizens; that he did not know that Tosney had been accused, or was a judge of election.

That the dismissal of Newman was not without cause, and he denies it was in violation of the duty imposed upon him as police commissioner, or that it was occasioned by the arrest of Tosney by Newman, and denies that Newman was discharged because he performed his duty; but he avers that Newman was inefficient, was complained of by his superior officer and was discharged from the force for good cause, and specified times when he remained away from duty when needed, and when he engaged in a brawl in a public saloon, specified when he had been guilty of several offenses, had been arrested for an assault on an old man, and had been charged with intoxication and insubordination, and that for an attempt at blackmail Newman was dismissed by the republican board of public works, and

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that the best interests of the police department required his dismissal from the force.

That respondent denies specifically many other things charged; and then also as to White, he says that White has served eight years under different mayors, and that so far as he has been advised or had knowledge, White has been a vigilant and useful officer for the past eight years. That the board requested the sub-committee of one hundred to furnish the board the names of one hundred persons to act as a special police at the election, but they furnished only twenty-seven names all of whom were appointed. That he swore in but one person as policeman, and he served in a court room. That at the request of members of the committee of one hundred he went to the rooms of the police commissioners at the appointed time, and that he found the sub-committee leaving the building, and that on inquiry of W. P. Anderson, one of the sub-committee, he was told by Anderson that, "it is all arranged; it is all right," and he knew nothing further of arrests until charges were promulgated against superintendent Hudson in relation thereto; and he refers to the transcript of a case against Hudson, superintendent of police, wherein the whole subject set out in charge No. 6 was tried, all the evidence bearing on it was heard, arguments of able counsel were made at length, and an opinion rendered by Judge Fitzgerald fully exonerating Hudson.

Stevens denies all, except that he was such officer. He avers the sickness of Hawkins, and that, on February 1, 1886, it was represented to the governor that the answer of Hawkins could not be filed for the reason that he was so ill that his physician forbade his consulting with his attorneys at that time. Thereupon it was agreed, with the consent of all present, and was so directed by the governor, that on February 3, 1886, the answer of Reis should be filed, and the answer of Hawkins should be filed at that time in case his counsel could prepare it in his absence, but in the event of his inability to confer with his counsel, or if not filed by reason of his sickness at that time, the gov-

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ernor then and there agreed that he would allow further time for the answer of Hawkins to be filed.

That counsel for Stevens then stated to the governor that an important professional engagement required his absence from the city. That the governor then and there agreed that the charges against Stevens should not be set for hearing at any earlier day than the first Tuesday following February 3, 1886, to wit, February 9, 1886. With that understanding the counsel for Stevens left the city and remained away until the Monday following, relying on the good faith of the governor that no action against Stevens would be taken until February 9th. During this time Stevens was sick with typhoid fever. On February 3, 1886, without hearing any testimony, without trial, and without any investigation of the truth of the charges, all of which were denied and put in issue by the answer, the governor made the order on the executive minutes of the state of Ohio, a true copy of which he attached to his answer. All this is admitted by the demurrer. Also, Stevens avers the same as Reis about the charge as to Tosney, and as to Newman, and as to most of the other charges. As to White, Stevens says, that when he was appointed on the board of police commissioners, White had been serving some eight years as police officer detailed to special duty, and that he was a vigilant and useful officer, that it was true that White had been in the penitentiary in 1877 for the violation of the election law in 1876, and that president Hayes pardoned White before half his term of thirteen months was served, but that he did not know of his being in the penitentiary until these charges were filed.

That thereupon the governor issued this order :

“OFFICE OF THE GOVERNOR, *February 3, 1886.*

“In the matter of the charges and specifications against Morton L. Hawkins, Julius Reis, and Will. A. Stevens, police commissioners of Cincinnati: Ordered by the governor this third day of February, 1886, certain charges and specifications of official misconduct having been preferred

against M. L. Hawkins, Julius Reis, and W. A. Stevens, police commissioners, which charges and specifications were duly filed in this office on the twenty-fifth day of January, and a copy of said charges and specifications having been served on each of said commissioners on January 27th, together with a notice of the filing of the same in this office and that they (the said commissioners) would be given until January 30th to file answers or any other pleadings they might desire to make to said charges and specifications, and that the same would thereafter be heard at this office on February 8d; and said Will. A. Stevens, having filed an answer, and said Morton L. Hawkins and Julius Reis having applied on that day for further time, to wit, until the third day of February, in which to file answers, and for a postponement of hearing until the 10th of February, and having filed, in support thereof, their respective affidavits.

“After hearing the said application, and further time for filing answers having been granted, and further hearing of the application for postponement until the 10th for hearing said charges having been continued until after the filing of their answers on the third day of February, and said matter coming on this day to be further considered, and it appearing that said Julius Reis has filed his answer to said charges, and that Morton L. Hawkins has failed to do so, and it further appearing from examination and consideration of said charges and specifications and answer thereto of Julius Reis, and from the affidavit of M. L. Hawkins that they, the said Reis and Hawkins, do each admit the appointment by them to a position on said police force of Mike Mullen, and also his subsequent promotion by their votes, as alleged in the charges aforesaid, and the said Mike Mullen being known to the governor as a man of notorious bad character and wholly unfit to hold any position on the police force, and it further appearing from the answer of W. A. Stevens that James S. White and others known to the governor to be men of notorious bad character and wholly unfit to hold any position, are holding

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positions on the same force and are continued there by his authority, consent, and approval, and it being in the judgment of the governor gross official misconduct to appoint and continue on said force such unfit and improper men, and this official misconduct being as aforesaid admitted by each and all said police commissioners in manner and form as above stated, and no investigation or hearing, and no exercise of judicial power being necessary to the finding and establishing of the fact of said official misconduct, it is considered by the governor that the applications for further delay should be and hereby are overruled, without regard to other charges and specifications.

“Said Morton L. Hawkins, Julius Reis, and Will. A. Stevens should each and all of them be, and they are hereby, removed from their said office of police commissioners of Cincinnati.

“In testimony whereof, I have hereunto set my name and great seal of the state, to be affixed at the city of Columbus, this third day of February, 1886.

[Signed,]

“J. B. FORAKER,

“Governor of Ohio.”

The answers filed are full, and they are undisputed, and clearly show that each police commissioner had conscientiously and faithfully performed his official duty. If any averments of the answers had been denied, testimony and a full investigation by any competent and honest tribunal, could not injure good government, or the best interests of Cincinnati, and it might expose the wrong-doers and the criminals. If there was jurisdiction, why was a trial refused? By removing the commissioners, the police force was crippled, but not one of the police force was removed.

To justify his act, the governor says, “Mike Mullen being known to the governor as a man of notorious bad character, and wholly unfit to hold any position on the police force.” And he says identically the same thing of White. But his remarkable statement is, “and no investigation or

hearing, and no exercise of judicial power being necessary to the finding and establishment of the fact of said official misconduct." He seemed conscious that he has no judicial power, and he *assumed* "official misconduct," and refused a trial. Why then the numerous charges, and why a call for answers, and an agreement that a defense to refute the charges might be made? Such acts were not a trial or a finding.

In argument, and to impress the conclusiveness of Reis' answer to the charges and the answers here, ex-governor Hoadly claimed that *he had* investigated the charges against Mullen, and found that Mullen, under orders, had arrested some one hundred and forty or one hundred and fifty men believed to have been brought into Ohio to put illegal ballots into the election boxes on the next day, and he thought Mullen, by his timely acts had prevented the deposit of hundreds of fraudulent ballots, and for such act he thought Mullen entitled to the commendation of all good citizens. And he thought the president so found when Mullen was pardoned. I know of no law preventing George Hoadly from being a witness to tell the governor what the facts were, and how the facts could be ascertained.

It is absurd to claim that the *governor's knowledge* of the bad character of any appointee of the police commissioners brings home to any commissioner *official misconduct*.

It seems incredible that the committee preferring the charges were willing that this man Newman should be branded with such charges as are specified in the answers of Reis and Stevens, and that the committee should not be allowed to clear him with evidence, if they could do so. Had the answers to the charges been denied, then justice to all parties would have demanded a full and impartial trial of the entire matter.

The answers to the charges being true, what was left of the charge of official misconduct? If any thing was left, the accused must be *found guilty* of the "official misconduct" charged. When guilt is denied, as here, such finding must involve a *trial* by some competent tribunal where

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there is a charge, testimony, deliberation and determination. This power is judicial. "Judicial includes the deciding upon a question of fact, viz: whether the alleged act has been committed; and upon a question of law, viz: whether the inquiry was material"—here was it official misconduct? See *People v. Keeler*, 39 Hun. 590. It is judicial to hear, adjudge and condemn. *People v Keeler*, 99 N. Y. 463, 484.

It is admitted that at common law the power to remove an officer for official misconduct, could only be exercised by the courts.

These police commissioners were not appointed by the governor, they were holding office for a definite period of time, their successors were to be elected by the electors of the city, they could be removed only for official misconduct.

In *Page v. Hardin*, 8 B. Mon. 672, the court says, "The secretary being removable for breach of good behavior only, the ascertainment of the breach must precede the removal. In other words, the officer must be convicted of misbehavior in office. And we shall not argue to prove that in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interests, and may, moreover, be seriously affected in his good fame and standing, implies a charge and trial and judgment, with the opportunity of defense and proof. The law, too, prescribes the duties and tenure of the office, and thus furnishes a rule for the decision of the question involved. Such a proceeding for the ascertainment of fact and law, involving legal right, and resulting in a decision which may terminate the right, is essentially judicial, and has been so considered here and elsewhere. By the common law, the forfeiture of an office held by patent or commission, was enforced by *scire facias*, and the judgment of the court. The trial of an impeachment is universally regarded as a judicial function, and the senate, sitting for the purpose, as a judicial body. Similar proceedings (for the removal of officers) in the county or other courts are held to be judicial. And we do not doubt that every proceeding for the re-

removal of an officer for cause, that is, for official misbehavior, is essentially an exercise of the judicial power of the commonwealth, and would, therefore, refer itself to the judicial department of the government, if not otherwise disposed of by the constitution or the laws."

The court go on to say that the constitution and laws have vested this power in the senate sitting as a court of impeachment, and that that tribunal alone can remove an officer for misconduct.

This case was followed with approval in *State v. Pritchard*, 86 N. J. Law, 101, in which, although the police commissioners of Jersey City had been convicted, on indictment, of conspiring to defraud the city, it was held that the governor had no power to remove them from office.

See also, *Dullam v. Wilson*, 53 Mich. 392, for a full discussion of the subject, and there the court hold, "In the absence of express constitutional authority, the legislature can not confer on the governor power to remove state or county officers, arbitrarily, and without hearing."

No one has claimed that in the division of powers by our constitution, such power is conferred upon the legislature, or appertains to the office of the executive.

As to the constitution of the United States, Story, in his Commentaries, § 1537, says: "As the tenure of office of no officers except those in the judicial department is, by the constitution, provided to be during good behavior, it follows, by irresistible inference, that all others must hold their offices *during pleasure*, unless congress shall have given some other duration to their office."

If held during pleasure, the duration may be ended without trial, but the judges of the United States hold their offices during good behavior, and the president can not end that duration. Neither can the president remove from office a judge who appoints as clerk of the court a man whom the president knows "to be of notorious bad character and wholly unfit to hold any position" as clerk.

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No judicial power is conferred on the governor of Ohio by the constitution.

“Such powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature can not require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he can not be excused by law. But other powers or duties the executive can not exercise or assume except by legislative authority, and the power which in its discretion it confers it may also in its discretion withhold, or confide to other hands.” Cooley Const. Lim. *115.

Whatever discretionary power the governor has must be given him by the constitution, and this power of removal is not given by the constitution, and other duties, given by legislative act, are not at his arbitrary discretion.

In the opinion of the case of *The State v. Chase*, 5 Ohio St. 535, Bartley, C. J., says: “However the governor, in the exercise of the supreme executive power of the state, may, from the inherent nature of the authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power, yet in regard to a mere ministerial duty enjoined on him by statute, which *might* have been devolved on *another* officer of the state, and affecting any *specific private right*, he may be made amenable to the compulsory process of this court by *mandamus*.

“Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests—‘all paying it homage, the least as feeling its care, and the greatest as not exempt from its power.’”

Calling the power “administrative” does not make it discretionary or change its character.

If judicial power were given and rightly exercised, the act might be final as the act of a court of last resort, or, if it were an act of official discretion, then it might be final.

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The governor says he did not exercise judicial power, and no one claims the power is merely discretionary.

If the governor could possess the power of removal, he was bound to hear testimony and give an opportunity to be heard.

In *Ex parte Ramshay*, 18 Q. B. 190, Lord Campbell, C. J., says: "The chancellor has authority to remove a judge of a county court only on the implied condition prescribed by the principles of eternal justice that he hears the party accused." See *Osgood v. Nelson*, 5 Eng. & Ir. App. 648, and *Commonwealth v. Slifer*, 25 Pa. St. 28.

The same point is decided in *Dullam v. Willson*, *supra*, where Champlin, J., delivering the opinion of the court, says: "There must be charges specifying the particulars in which the officer is subject to removal. It is not sufficient to follow the language of the constitution. The officer is entitled to know the particular acts of neglect of duty, or corrupt conduct, or other act relied upon as constituting malfeasance or misfeasance in office, and he is entitled to a reasonable notice of the time and place when and where an opportunity will be given him for a hearing, and he has a right to produce proof upon such hearing. What length of time notice should be given we do not determine; it must depend in a great measure, upon the circumstances of each case.

"I have examined carefully the authorities cited upon the brief of the learned counsel for the relator in support of the position that no notice is required to be given, and that the action of the executive is final and conclusive. It is sufficient to say, without commenting specially upon them, that the reasoning of those cases does not commend itself to my judgment. They appear to me to be opposed, not only to the decided weight of authority, but also to the fundamental principles of justice."

Chief Justice Cooley concurred. There was no dissent, but Campbell, J., in a concurring opinion, says: "That removals for cause are judicial acts, and that they must be disregarded, whether appealable or not, if not conforming

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to jurisdictional requisites, has been settled so long, not only in this state, but by the common-law doctrines and by the general agreements of courts, that there is no room for serious controversy."

That this court will inquire, on *quo warranto* proceedings, whether or not an officer has been removed from office, is settled in Ohio, and has just been exercised in the case of *The State ex rel. Attorney-General v. Hudson, infra*, 137.

Section 6 of article 10 of the constitution (referred to in the majority opinion) shows the policy of our law. That provides: "Justices of the peace, and county and township officers, may be removed, *in such manner* and for *such cause*, as shall be *prescribed* by law." Not only the CAUSE must be prescribed, but there must be prescribed the *manner* of proceedings to establish the cause, and the manner of removal. Then a claimed removal may be inquired into. This is shown also by § 1976 of the Revised Statutes, providing for cities of the second grade of the first class (Cleveland), and which was enacted in 1876, the year preceding the passage of this original act, which was 1877. Section 1976 provides: "Either of the commissioners of police may at any time be removed by the city council, upon good cause being shown, three-fourths of all the members concurring; and where charges are made against a commissioner, he shall have an opportunity to present evidence and be heard in his behalf."

Also, in a general provision in § 1685 of the Revised Statutes, it is enacted that, "in no case shall such removal be made, unless a charge in writing is preferred, and an opportunity given to make defense." For a defense there must be a tribunal with sufficient judicial power to try the case; and such trial may be inquired into. Any other course is outside of a government by law.

In *The State v. Harmon*, 31 Ohio St. 250, relied upon in the majority opinion, which was a proceeding in *quo warranto*, the question involved the constitutionality of the act conferring on the senate authority to try the contested election of a common pleas judge. White, J., says: "The

constitution itself plainly recognizes the separation of the authority to try contested elections, from the judicial power which is required to be vested in the courts. Section 21, article 2, is as follows: 'The general assembly shall determine by law before what authority, and in what manner, the *trial* of contested elections shall be conducted.'" The court does not hold that the power to try such cases is not *judicial power*, but it only holds, it "is not judicial power within the meaning of section 1, article 4, of the constitution, which requires the judicial power of the state to be vested in the courts." There must be a *trial*, by a competent *tribunal*, in a prescribed manner.

In *Patten v. Vaughan*, 39 Ark. 211, cited and relied upon in the majority opinion, the court held: "In the absence of constitutional or legislative restriction, where no *definite* term of office is prescribed by law, the power of removal is *incident* to the power of appointment." That can not apply to this case. The commissioners were *not* appointed by the governor, and their term of office was *prescribed*.

And, in another case relied upon, *State v. Doherty*, 25 La. Ann. 119, Wyly, J., says, "The law provided that the governor might make the appointment, and for a certain cause remove the officer appointed by him. Here the law invested the governor with a *discretionary* power, which could alone be employed by him." Such cases do not sustain propositions 2 or 3 of the syllabus; neither does any former decision of this court.

Examine other cases cited and relied upon by the majority, and note what support, if any, is given to this case. In *the matter of Cooper*, 22 N. Y. 67, appellant appealed from an order, made at a general term of the supreme court, denying appellant to be admitted to practice as an attorney and counsellor at law. The court held, "In the admission of attorneys and counsellors, the supreme court acts judicially. The function is not of an executive character."

In *Keenan v. Perry*, 24 Tex. 253, the governor had appointed for an indefinite term, and the court says, "The continuation in office of the superintendent of the lunatic

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asylum, was determinable at the *pleasure* of the governor."

In *Taft v. Adams*, 3 Gray, 126, the court held, "The legislature have the power to shorten the term of office of any officer, the tenure of whose office is not fixed by the constitution."

In *Ex parte Wiley*, 54 Ala. 226, the county solicitor had been suspended from office by a court, and the court held, "The court acts *ex mero motu*, and of its own knowledge, under the provisions of the statute."

In *Thompson v. Holt*, 52 Ala. 491, a probate judge failed to give a required bond, and the court held, "the failure to give the bonds required is the voluntary act of the judge himself, and the vacancy thereby occasioned, when enforced against him, is in no legal sense a 'removal from office,' within the meaning of the constitution, or otherwise violative of its provisions."

In *State v. Frazier*, 48 Ga. 137, a tax-collector's commission had been vacated on his failure or refusal to account for public moneys, and when such fact exists it was a "sufficient reason for vacating any office held by such person," and when such fact existed the governor could remove.

In *Dougan v. District Court*, 22 Am. Law Reg. (N. S.) 528, the court held, "Where a statute authorizes an administrative or ministerial body (as the council of a city) to appoint an officer to hold *during its pleasure*, such body can remove in its discretion, and the exercise of such discretion can not be controlled or restrained by the courts."

In *State v. McGarry*, 21 Wis. 496, power was given the supervisors of the county to remove the inspector of the house of correction, for "cause *satisfactory* to the board," and the court held, "under that act the board may remove without examining witnesses under oath, or giving the officer previous notice of the *investigation of charges* against him." But an investigation must show cause satisfactory to the board. So, in *State v. Prince*, 45 Wis. 610, the county board of supervisors may remove the clerk of such board "if, in the opinion of said board," there "shall be a

sufficient cause for such removal," "but an appeal lies to the circuit court from the order of removal."

Donahue v. County of Will, 100 Ill. 94, was the removal of a county treasurer by the county board, and finding that the treasurer had not settled and accounted for moneys as required by law, and had been and was in arrears with the county; and the court held, "if the court finds that the inferior body had no jurisdiction, or exceeded it, or had not proceeded according to law, it should quash the proceedings shown by the return."

I fail to find in these cases justification for propositions 2 or 3 of the syllabus. Charges, ample in statement but false in fact, may be preferred; and, on notice, answers clearly refuting the charges may be given, and undisputed evidence offered to prove the charges false and the answers true; and the record may show that the governor had not proceeded according to law, and had refused a trial or hearing; and the record may also show, the governor said he removed the officers for no act of theirs, but by reason of his estimate of the character of other parties, their appointees: all this would not remove the officers.

The record might show there was no "official misconduct," and no proper proceedings, and that all was void. We are asked to presume against the statements of the record.

This extreme claim seems necessary to justify the removal of officers of great value to the police force of Cincinnati. Thus Cincinnati must suffer from outside interference in her city matters. Could she be permitted to control her own internal affairs, doubtless she would exhibit the truth of the fundamental and vital doctrine of efficient and vigilant "home rule."

The citizens of Cincinnati, and these police commissioners, had an interest that these officers should remain in office until by official misconduct they forfeited their right, and until the official misconduct was legally established. This right is not money or other property; but, like reputation, it is valuable to a good citizen.

Are Cincinnati, and the officers thus removed without a hearing, entirely without remedy? The majority opinion says, "For an abuse of such power, the remedy is, either to the people in the election of a successor to the officer abusing the power reposed, or, when the removal is characterized by circumstances of flagrant abuse, he may be impeached and deprived of his office."

What are the facts here as to these remedies? Not for twenty months in the future will there be an election for a successor. Then the injured citizens can participate in defeating the re-election of one who has abused such extraordinary power. How inadequate is this remedy!

As to impeachment, the constitution, section 23, article 2, provides, "The house of representatives shall have the sole power of impeachment."

On January 11, 1886, when the governor's term of office began, his party friends had a majority of six in that house. On the next day, January 12, 1886, nine opposing members from Hamilton county, who legally held certificates entitling them to membership in that house, as was held without dissent by this court in the case of *Daniel J. Dalton, Clerk, et al., v. Oliver Outcalt, et al.*, December 11, 1885, were turned out of that house and nine of his party friends were taken in—thus obtaining a majority of twenty-four of his party friends.

With such conditions, no one would seek redress by impeachment. Laws and holdings, permitting such results, can not endure.

OWEN, C. J., dissents from the third proposition of the syllabus, but concurs in the judgment upon other grounds stated in the opinion.

THE STATE *ex rel.* ATTORNEY-GENERAL v. HUDSON.

Constitutional law—Act of April 3, 1885—Law of general nature—Power of mayor to remove superintendent of police.

1. The act of April 3, 1885 (82 Ohio L. 101), providing for a police force in "cities of the first grade of the first class," applies to all cities of that grade and class in the state, and is a law of a general nature, having a uniform operation throughout the state, and is constitutional.
2. The mayor of the city of Cincinnati has no power to remove from office the superintendent of police of that city, though the board of police commissioners, that appointed such superintendent under the provisions of the act of April 3, 1885 (82 Ohio L. 101), has been removed from office.

QUO WARRANTO.

Relator avers, in his petition, that on April 28, 1885, the then existing board of police commissioners of the city of Cincinnati, appointed the defendant, Edwin Hudson, superintendent of police of said city. That defendant entered upon his duties as such officer, and was still acting in that capacity when suspended from office, as hereinafter set forth.

That on February 3, 1886, the police commissioners were duly removed from office by the governor of the state of Ohio, and that thereupon the control of the police force of the city devolved by law upon the mayor of the city until such time as the vacancies in the board could be filled as provided by law, and thereupon the mayor became vested with power to make orders, rules and regulations, for the government, discipline, and duties of the police force of the city.

That, in pursuance of the powers devolved upon and vested in him by law, Amor Smith, Jr., mayor of the city of Cincinnati, on February 5, 1886, duly issued an order to Hudson, as superintendent of police, to report to him for instruction, which order Hudson wholly refused to obey, and defied the power of the mayor by declaring that

44	187
44	118
44	189
44	187
52	417
44	187
55	10
44	187
68	611

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he did not recognize his power to issue the order or give him instructions, and that he would only obey orders and instructions from the board of police commissioners, which board had been removed as aforesaid.

Relator says that the refusal of Hudson to obey the orders of the mayor was an act of insubordination and disobedience.

That thereupon, February 6, 1886, the mayor, in pursuance of the powers vested in him by law, duly issued an order suspending Hudson from further acting as superintendent of police—a copy of which order was served on Hudson—on the ground of insubordination and disobedience.

That, notwithstanding such suspension from office, and in defiance thereof, and since the date of the service thereof on defendant, the defendant has unlawfully held and exercised the office of superintendent of police of the city of Cincinnati, and is still unlawfully holding and exercising such office.

Wherefore he prays for the advice of this court in the premises, and that defendant be compelled to answer by what warrant he claims to hold and exercise the office, and that he may be ousted from the same.

To this petition Hudson demurs, on the ground that the petition does not state facts sufficient to constitute a cause of action.

Jacob A. Kohler, attorney-general, and *Thomas McDougall*, for plaintiff.

Hoadly, Johnson & Colston, for defendant.

FOLLETT, J. Relator avers that on April 3, 1886, the police commissioners of the city of Cincinnati were removed from office by the governor of Ohio; and that on February 6, 1886, the mayor of Cincinnati removed from office Edwin Hudson, the superintendent of police, but that Hudson refused to surrender the office, and relator prays for judgment of ouster.

If relator does not aver facts that show a cause of action against Hudson, the demurrer of Hudson should be sustained.

Relator insists that the act of April 3, 1885 (82 Ohio L. 101), under which Hudson was appointed, is *not* constitutional, as it is inhibited by section 26, article 2, of the constitution, which provides that, "All laws, of a general nature, shall have a uniform operation throughout the state."

This question vitally affects Cincinnati, as well as Cleveland, Toledo, Columbus and Dayton; for, at present, under our system of classification of cities, there is but *one* of these cities in a *general* class. This act (§ 1870) applies to "cities of the first grade of the first class"—to all such cities in Ohio—though Cincinnati is now the only city in that class. Each city just named is now similarly situated. Each of the large cities seems to need peculiar legislation, which can be provided only by such general classification. The peace and prosperity of these cities, and the best interests of the state, require that this system of classification be regarded as *stare decisis* and settled. See Rev. Stat., § 1546. Under the power to organize cities and villages (Const., Art. 13, § 6), the general assembly is authorized to classify municipal corporations, and an act relating to any such class may be one of a general nature. See *State v. Covington*, 29 Ohio St. 102; *State v. Mitchell*, 31 Ohio St. 592; *The State v. Brewster*, 39 Ohio St. 653, 658.

Recently this court, without a dissent, reaffirmed this principle in the case of *Alice D. Scheer v. The City of Cincinnati*, on error to the superior court of Cincinnati (15 Week. L. Bull. 66), which case was not reported. In that case the court held to be constitutional the act of April 25, 1885, (82 Ohio St. 156, § 2293a), providing for improving the streets of Cincinnati.

By the same principles and holdings, the act in question here, by the provisions of which Hudson was appointed to his office and now holds and exercises the same, is also con-

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stitutional, as not inhibited by section 26 of article 2, or section 1 of article 13, of the constitution.

This really disposes of the whole case. We are not told why, or by what law, the mayor assumed to act. There is no statute expressly enabling the mayor to remove Hudson. This act provides, by section 1870, "All police powers and duties connected with and incident to the appointment, regulation and government of a police force . . . shall be vested in a board of three members, . . . and they shall be called the board of police commissioners." Section 1876. "The board is hereby invested with, and shall, when necessary, exercise all the powers which are conferred by law upon mayors of cities and sheriffs of counties, in respect to requiring the services of the military, in aid of the civil authorities, to quell riots, suppress insurrection, protect property, and preserve public tranquillity; and such investiture of power shall *exclude*, within the city, *the exercise of similar powers by the mayor* of such city, or sheriff of the county in which the city is situated."

Section 1879 provides what shall compose the *police force* of the city, and makes the *superintendent* of police the chief officer of the police force.

Section 1878. "It shall be the duty of the board and of the *force* hereby constituted, at all times of the day and night, within the boundaries of the city, to preserve the public peace, prevent crime, arrest offenders, protect rights of persons and property, guard the public health, preserve order, remove nuisances existing in public streets, roads, places, and highways, . . . protect strangers, and travelers at steamboat and ship landings and railway stations, and generally to obey and enforce all ordinances of the city council, criminal laws of the state and of the United States."

These provisions show the necessity of having a *superintendent* of police, and they also show that the mayor of the city has no control of the police force or of the superintendent of police. Much less has the mayor the power to re-

move from office the superintendent of police. No adequate reason has been given for the attempted removal.

It is not sufficient to state that as the governor had removed the board of police the mayor claimed the control of the police force and sought to compel obedience by removing from office the superintendent of police. Such power is conferred only by statute, and there is no such statute. This attempt, by the mayor, to take control of the police force of Cincinnati, is without legal support. To show there is no *ground* of claim for the *power* so to remove Hudson, at the suggestion of my brethren, I add the following analysis of the statutes.

If it be said the mayor derives the right from the fact that section 1744 makes him a conservator of the peace throughout the corporation, the same is true of every justice of the peace (§ 610). We are referred to section 1874, as amended February 27, 1880 (77 Ohio L. 23), which provides, "The mayor shall have power to make and publish, from time to time, orders, rules and regulations, for the government, discipline and duties of the police force." It is true this section is not directly repealed by the act of April 8, 1885 (82 Ohio L. 101,111), but it will be observed that it constitutes a section of the first subdivision of the fifth chapter of the fifth division of the twelfth title, part first, of the Revised Statutes, and section 1875, as amended April 8, 1885 (82 Ohio L. 102), provides that the board of police commissioners "shall have the other powers and other duties specified in this subdivision." This would repeal section 1874 by the strongest possible implication, even if section 1874 had the power claimed for it. But, upon reference to the act of 1880, it will be found that section 1874 did not give the mayor power to appoint or remove policemen. That power was given by other sections, namely, sections 1875, 1879 and 1881, all of which were repealed by the act of 1885. Section 1874, having no reference therefore to the power to appoint or remove a superintendent of police, the attempt of the mayor to supersede Hudson is necessarily ineffectual. Section 1874 can not have

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any greater force or effect now than was ascribable to it before the repeal of sections 1875, 1879 and 1881. *State v. Thompson*, 34 Ohio St. 368.

Besides, section 1874, if still in legal existence, does not profess to confer a power of appointment or removal. Its effect is expressly limited to the making and publishing of rules:—rules for government, discipline and duties of the force when established, not for creating or changing its membership.

Section 1711 can not help the mayor. It gives no power of removal:—and the petition does not show an appointment by the mayor, in place of Hudson, “with the advice and consent of the council.” Besides, section 1711 does not apply, because the method of appointing a superintendent of police is “otherwise provided in this title,” viz., by section 1875.

For the same reasons, section 1713 does not apply, although it might authorize “the mayor, with the advice and consent of the council,” to fill a vacancy in the office of police commissioner, but for the explicit provisions of section 1870.

The attempted removal is a nullity. The petition does not state a cause of action, and the demurrer thereto is sustained.

Writ refused.

Ex parte DALTON.

Contempt of legislative body—Power of committee to command clerk to produce poll-book—Commitment to jail upon refusal.

1. A standing committee on privileges and elections of either house of the general assembly, while engaged under the orders of such house in taking testimony and making investigations to be reported to it, in a contest for membership thereof, pending therein, with power to send for persons and papers, may, by a subpoena *duces tecum*, lawfully command a clerk of the court of common pleas, having custody thereof, to produce before such committee any poll-book affecting the election involved in such contest, although this may require its removal to another county than that in which his office is situated.

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2. Upon the refusal of the clerk to obey the command of such subpoena, it is lawful for such house, upon his arraignment therein and further refusal, to order his commitment to jail as for contempt of its authority, until he obeys, or signifies his willingness to obey, the command of such subpoena; such imprisonment not to extend, however, beyond the pending session of the general assembly.

ERROR to the Circuit Court of Franklin county.

HABEAS CORPUS.

On the 11th day of February, 1886, the standing committee on privileges and elections of the house of representatives of the general assembly of Ohio was, by authority of the house, regularly engaged (in a contest for membership) in an investigation, at the city of Columbus, affecting the election and qualifications of certain members of such house, and certain alleged frauds charged to have been committed in Hamilton county, in the election of such members, with power to send for persons and papers, and to examine the returns of such election, in order to the determination of the questions involved in such investigation. While so engaged, such committee duly caused a subpoena *duces tecum* to issue, commanding Daniel J. Dalton, clerk of the court of common pleas of Hamilton county, to appear as a witness and produce before such committee the poll-book and tally-sheet of the October election of 1885 for precinct A of the Fourth ward of Cincinnati; the same being pertinent to such investigation. The subpoena was duly served. Dalton appeared, but refused to produce the papers named in the subpoena. His refusal was reported to the house, at the bar of which he was called upon to answer for his refusal to obey the command of the subpoena, where he still refused, acting under the advice of his counsel, to produce such papers, without an order of the court of which he was clerk. Thereupon, by the authority of a resolution of the house, and its warrant duly issued by its speaker, he was committed to the custody of the sergeant-at-arms of the house as for contempt of its authority, to be by such officer committed to

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the jail of Franklin county in such city of Columbus, for thirty days from and including the date of such commitment, or until the close of the present session of the general assembly, if the same should close within that period; unless he should sooner signify his willingness to produce the papers called for by the subpoena. Being in the custody of such officer, Dalton duly procured a writ of *habeas corpus* to issue out of the court of common pleas of Franklin county, commanding such sergeant-at-arms to show cause for the caption and detention of his prisoner. Upon the foregoing facts such court, Hon. Hawley J. Wylie presiding, adjudged the detention to be lawful, and remanded the prisoner to the custody of such officer.

The judgment was affirmed on error by the circuit court, and to reverse this judgment of affirmance the present proceeding is prosecuted.

Baker & Goodhue, for petitioner.

A court, upon *habeas corpus*, may inquire, not only into the jurisdiction of the tribunal attempting to punish as for contempt, but may inquire into the legality of the grounds upon which the claim that the petitioner is in contempt are based. *Kilbourn v. Thompson*, 103 U. S. 168.

The writ was void, and there can be no contempt in disobeying a void writ. *People v. Bradley*, 60 Ill. 390.

Neither the house of representatives, nor a committee of its members, have power to compel the petitioner to produce, out of his county, a poll-book of which, under section 2961 of the Revised Statutes, he is made the custodian. The language of that section is, that the poll-book shall be deposited with the clerk, "there to remain for the use of any person who may choose to inspect the same."

Public records that have a depository, in the absence of statutory inhibition, can not be taken from the place of deposit; nor can their custodian, by the process of *subpœna duces tecum*, be compelled to remove them from thence, especially when the instrument or record is susceptible of exemplification. Every document of a public nature which

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there would be inconvenience in removing, and which the party has the right to inspect, may be proved by a duly authenticated copy. *Bowman v. Sanborn*, 25 N. H. 87-113; *United States v. Delespine*, 12 Pet. 654; *United States v. Percheman*, 7 Pet. 51-85; *In re Dillon*, 7 Sawyer, 571; *Corbett v. Gibson*, 16 Blatchf. 334; *Bradley v. Silsbee*, 33 Mich. 328; *Raymond v. Longworth*, 4 McLean, 481; 1 Greenl. Ev. 103.

The house of representatives is without power to punish for contempt. There is no direct constitutional grant of such power.

A trial and conviction as for a contempt is the exercise of judicial power. *People v. Keeler*, 39 Hun, 563; s. c. on appeal, 99 N. Y. 463.

Section 32, article 2, of the constitution, inhibits the exercise of judicial power by the general assembly. See *State v. Harmon*, 31 Ohio St. 250, 258.

So then, in looking for this power to send a man to jail on a finding in contempt, the house of representatives in Ohio either gets it from statutory enactment (Rev. Stat., § 52), or common law; that is, the power is inherent.

It can not derive the power from both sources. It can not have authority to punish for contempt by statutory grant and common law grant. If a statute attempts to prescribe a penalty for a defined offense, no other can be inflicted; and you can not go outside the statute to find either another penalty, or another source of power to inflict other than the statutory penalty. *Haney v. State*, 5 Wis. 529; *Driskill v. Parrish*, 3 McLean, 631; *Brooklyn v. Toynbee*, 31 Barb. 282; *Sipperly v. Railroad Co.*, 9 How. Pr. 83; *Washburn v. McInroy*, 7 Johns. 134; *Tiffany v. Driggs*, 13 Johns. 252; *Scrinegrour v. State*, 1 Chand. (Wis.) 48.

And this rule is equally applicable in the definition and punishment of what may be styled contempt. *Bickley v. Commonwealth*, 2 J. J. Marsh. (Ky.) 572; *Ex parte Edwards*, 11 Fla. 174; *Dunham v. State*, 6 Iowa, 245.

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And the same principle is enunciated in *Tweed's case*, reported as *People v. Liscomb*, 60 N. Y. 559.

In *Dunham v. State, supra*, the court held, p. 257: "It is insisted, however, that the courts of this state may punish other acts and omissions, as contempts, than those mentioned in the code. We are strongly inclined to think, however, that the provisions of the code upon this subject must be regarded as a limitation upon the power of the courts to punish for any other contempts."

No act or conduct can be a contempt that does not fall within the designation of the statute. *McDonald v. Keeler, supra*; *Dunham v. State, supra*.

No inherent power exists in legislative bodies to punish for contempt. *Kilbourne v. Thompson*, 103 U. S. 168; *Stockdale v. Hansard*, 9 Ad. & El. 1; *McDonald v. Keeler, supra*.

No punishment is prescribed by statute in Ohio for contempt of a legislative body.

Section 52 of the Revised Statutes provides that such person "shall be liable to the pains and penalties for contempt of the authority of the general assembly." What these "pains and penalties" are does not appear. They are not prescribed.

The statute further provides that he "shall be dealt with according to parliamentary rules and usages in cases of contempt." Punish a citizen of Ohio according to "rule or usage?"

There are neither common law offenses or penalties in Ohio. *Key v. Vattier*, 1 Ohio, 132; *Vanvalkenburg v. State*, 11 Ohio, 404; *Allen v. State*, 10 Ohio St. 287; *Smith v. State*, 12 Ohio St. 466.

The federal constitution guarantees that "no person shall be deprived of life, liberty, or property, without due process of law." Even the inherent right of a court of justice to punish for contempt is compelled to bow to this constitutional guaranty.

Miles & Stevenson, also for petitioner.

Our state government is divided into three co-ordinate

branches, exercising distinct functional powers, sharply defined by constitutional limitations. Neither of these branches can exercise any powers not expressly given by the people in whom all political power is inherent and from whom all just powers are derived. By the constitution, "the legislative power is granted to the general assembly, the executive power to the governor, and the judicial power to the courts." *C. W. & Z. R. Co. v. Clinton Co.*, 1 Ohio St. 85. And by express terms "all powers not herein delegated remain with the people." Sec. 20, Bill of Rights.

The general assembly is expressly inhibited from exercising any judicial power, with the single exception of the power of impeachment.

Neither the house nor its committee on privileges and elections was, in the investigation upon which they were engaged, acting in the capacity of a court.

No help whatever can be obtained from English precedents, as was admitted by court and counsel in *Kilbourn v. Thompson*, 103 U. S. 168; for as has been said the "omnipotence of the British Parliament forms no criterion on this side of the Atlantic." That legislative body has always assumed the right of judicature as well as of legislation.

Contempt is an "offense" or it is not. If it is an "offense," and the penalty therefor is so defined as to deprive the defendant of his liberty, then he is entitled by due process of law to have the truth of the matter tried before a court of competent jurisdiction.

Jacob A. Kohler, attorney-general, *George K. Nash* and *Jesse L. Cameron*, for respondent.

There are many leading cases and many text books of the highest respectability that maintain that the authority to punish for contempt is a necessary incident, inherent in the very organization of all legislative assemblies, and of all courts of law and equity independent of statutory provisions. *Anderson v. Dunn*, 6 Wheat. 204; *Yates v. Lansing*, 9 John. 395; 1 Kent Com. 300; *State v. Copp*, 15 N.

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H. 212; 1 Story Const. 595; Rawle Const. 48; Cooley Const. Law. 134.

The case of *Anderson v. Dunn*, *supra*, decided in the supreme court of the United States, is strongly in point. That was an action for false imprisonment against the sergeant-at-arms of the house of representatives, and it was held to be a legal justification and bar to plead that the house of representatives had resolved that the plaintiff had been guilty of a breach of the privileges of the house and of a high contempt of the dignity and authority of the same. That case has not been overruled. The broad power, asserted in that case, was modified, in the subsequent case of *Kilbourn v. Thompson*, 103 U. S. 168; but in all cases of a judicial nature, such as the election, returns and qualifications of members, the authority of *Anderson v. Dunn* stands unshaken.

No doubt the sovereign legislatures, the houses of parliament, and our state legislatures, have the power to commit for contempt committed in their presence, or for disobedience of their orders. 3 Whart. Crim. Law, 3445. See also 1 Greenl. Ev. 402; *Burnham v. Morrissey*, 14 Gray, 226.

The prerogative of a legislative body, or of either house, to punish for contempt, is maintained as a necessary incident, or as inherent in its very organization by Fowler, J., in *State v. Mathews*, 37 N. H. 451.

If the contempt be committed in the presence of a court or of a legislative body, the offending party may be ordered into custody without any warrant or written order. *State v. Copp*, 15 N. H. 212; *State v. Mathews*, *supra*. And see also *Wickelhausen v. Willet*, 12 Abb. Pr. 319; Doc. 327 N. Y. House of Assembly; *In re Falvey*, 7 Wis. 630.

Upon the proposition that in all cases of contested elections and to determine the qualification of its members, and where the examination of witnesses is necessary to the performance of these duties, the house may fine and imprison a contumacious witness. *Kilbourn v. Thompson* is clearly

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and forcibly in point and sustains the position of respondent in every particular.

OWEN, C. J. 1. It is maintained on behalf of the petitioner that neither the house of representatives nor its committee had power to command him to remove any of the poll-books committed to his custody from his office and take them out of his county. This claim is based upon the assumption that section 2961 of the Revised Statutes requires that the poll-books shall remain in his office and not be removed therefrom under any circumstances.

This section provides that :

“After canvassing the votes in the manner aforesaid, the judges, before they disperse, shall put under cover one of the poll-books, seal the same, and direct it to the clerk of the court of common pleas of the county; and one of the judges (to be determined by lot, if they can not otherwise agree), shall convey the same to the clerk, at his office, within three days from the day of election; and the other poll-book shall be forthwith deposited with the clerk of the township, or the clerk of the municipal corporation, as the case may require, there to remain for the use of any person who may choose to inspect the same after the expiration of the time within which any legal notice of the contest could be given.”

It requires but a casual examination of this section to show that the contention of the petitioner proceeds upon a misconstruction of it; that the words “there to remain” have relation not to the poll-book which is to be conveyed to the clerk of the court of common pleas, but to “the other poll-book,” which is to be deposited with the clerk of the township or municipal corporation.

That this position of the petitioner is untenable, clearly appears from the provisions of sections 3003, 3004, 2998, 2999, and 3001 (Rev. Stats.) These sections are more fully considered in the third paragraph of this opinion. They clearly contemplate a trial before that branch of the general assembly to which a contest is taken on appeal, and

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the production before such house, or a committee acting for it, of the returns of an election which is being investigated.

The right of the house to command the production before it, or its committee, of the papers named in the subpoena, and of the witness to produce them, is clear.

2. It is further maintained in behalf of the petitioner, that even if it was lawful for him to produce before the committee at Columbus the poll-book demanded, the house had no power, upon his refusal to produce it, to commit him as a punishment for contempt of its authority.

The case of *Anderson v. Dunn*, 6 Wheaton, 204 (decided by the supreme court of the United States in 1821), declared the doctrine that representative bodies in America possessed, inherently, the power to punish for contempt. For sixty years following this decision, its authority remained unquestioned in this country. The repeated and unqualified declarations of this principle by courts and text-writers are to be traced to this case. *Maurice v. Dyer*, 2 Greene, 165; *Yates v. Lansing*, 9 Johnson, 395; 1 Burr's Trial, 352; *United States v. Hudson*, 7 Cranch, 32; 1 Kent's Com. 300; *United States v. New Bedford Bridge*, 1 W. & M. 401; *Tenney's case*, 23 N. H. 162; *State v. Copp*, 15 N. H. 212.

The later case of *Kilbourn v. Thompson*, 103 U. S. 168, is relied upon by counsel for petitioner as an authority in support of his position, and as overruling *Anderson v. Dunn*.

In the case of *Kilbourn v. Thompson*, the plaintiff had, on proceedings similar to those taken in the present case, been convicted of a contempt, and sentenced by the house of representatives of congress to imprisonment. It appeared on the face of the proceedings, that the contempt consisted of his refusal to answer a question propounded by a committee of the house appointed by a resolution, which was set forth. This resolution directed the committee to investigate certain business transactions in which the United States government was interested simply as a creditor of one of the parties, and the supreme court held that the preamble and resolution under which the committee was appointed showed

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upon their face that the investigation ordered did not have for its object any legislative action, or the impeachment of any officer of the government, but the collection of a debt owing to the government, a power which congress could not exercise, but which was vested only in courts of justice; that in ordering such an investigation, the house of representatives exceeded the limits of its powers, and, consequently, the committee had no authority to require the plaintiff to testify before it. On this sole ground, the decision of the court was placed, but in arriving at this conclusion, several important points, which have a bearing upon the question now before us, were discussed in the highly instructive opinion of Justice Miller.

It may be conceded that so far as *Anderson v. Dunn* declared the doctrine that representative bodies in this country possess, inherently, the general and unlimited power to punish for contempts, it is overruled by *Kilbourn v. Thompson*, but so far as it has application to the questions now before us, its authority remains unshaken by the latter case.

This is apparent from the following language of the syllabus of *Kilbourn v. Thompson*: "*Held*, that, although the house can punish its own members for disorderly conduct, or for failure to attend its sessions, and can decide cases of contested elections, and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the government, and may, where the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness—there is not found in the constitution of the United States *any general power* vested in either house to punish for contempt."

In the course of a very learned and able opinion, Justice Miller says: "Each house is by the constitution made the judge of the election and qualification of its members. In deciding on these, it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body en-

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gaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature."

Here is a recognition of the power which the house exercised in the case at bar.

The case of *McDonald v. Keeler*, 39 Hun (N. Y.) 563, which is relied upon by the petitioner, is not an authority against the power of the house to commit, for contempt, a witness in an election contest, for the reasons (1) that, as counsel concede, it was reversed by the court of appeals of that state (99 N. Y. 463), and (2) that while denying the power of a branch of the general assembly to punish for contempt in the particular case before it, Learned, J., qualified the general rule in the following language:

"Here, then, we must notice that by the constitution the legislature has certain judicial powers. Each branch is the judge of the qualifications of its own members. This power is judicial in character, though often partisan in fact. There is a power to remove certain judicial officers. There is a power of impeachment. These are judicial powers. They imply a decision on past occurrences, and a giving judgment accordingly. It may be, therefore, that in all actions of this kind, the senate and the assembly may rightfully enforce the same power of punishing for refusing to answer questions which is exercised by courts. These cases, therefore, we exclude from consideration."

The constitution of Ohio ordains (Art. 2, § 6) that: "Each house shall be judge of the election, returns, and qualifications of its own members."

The house of representatives was exercising, through its committee, the power thus conferred, at the time of the commitment of the petitioner.

The power to enforce the attendance and testimony of witnesses, and the production of papers affecting the election of its members, is indispensable to the efficient exercise of the power so conferred.

That the power to commit a recusant witness for contempt in disobeying the command of a subpoena issued

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in the due course of an investigation affecting the election of any of its members, is invested in each house, is now too firmly established to be considered a debatable question.

Anderson v. Dunn, 6 Wheaton, 204; *Kilbourn v. Thompson*, 103 U. S. 168; *McDonald v. Miller*, 39 Hun. (N. Y. Sup. Court) 563; *s. c.*, 99 N. Y. 463; *Rapalje on Contempts*, § 2, and cases there cited.

3. Counsel for petitioner maintains, further, that the only power conferred by statute on each house to proceed against a disobedient witness for contempt of its authority is derived from section 52 (Revised Statutes), and that the power therein attempted to be conferred is too vague and indefinite regarding the mode of punishment to be capable of legal enforcement.

Section 50, Revised Statutes, provides: "That a chairman may issue subpœnas;" section 51 provides to whom subpœnas shall be directed, and how served, and the form; and section 52 provides punishment for disobeying the subpœna, or refusing to answer, or refusing to produce books or papers.

Section 52 provides: "Whoever willfully fails to appear in obedience to such subpœna, or appears and refuses to answer any question pertinent to the matter of inquiry, or declines to produce any paper or record in his possession or control, shall be liable to the pains and penalties for contempt of the authority of the general assembly, . . . according to parliamentary rules and usages in case of contempt; and the chairman of the committee before which such person fails to appear, or refuses to answer, or produce a paper or record, as aforesaid, on the order of the committee, or a sub-committee, shall report the facts to the proper branch of the general assembly, and on like order, issue a warrant for the arrest and conveyance of the witness before that branch, to answer for the contempt; and the sergeant-at-arms, or sheriff, to whom such warrant is directed, shall forthwith execute the same," etc.

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Rules have been adopted by the house to effectuate the provisions of this section.

Counsel for petitioner repeatedly asserts, during his argument, that it is conceded that the only statutory power to commit for contempt is to be found in this section (52). By whom this concession is made we are not advised. Certainly, this court has not made, nor is it bound by, any such concession.

On the contrary, we find that express statutory power is given to make the order by which the petitioner was placed in the custody from which he seeks to be discharged by the proceeding we are reviewing.

Section 3003 (Revised Statutes) provides, generally, for an appeal to, and contest before, either branch of the general assembly, of the right of a person declared elected thereto. Section 3004 provides that the provisions of sections 2998, 2999, and 3001 (relating to contests for county offices), shall apply to contests for seats in the general assembly. Section 2998 provides, that the officers authorized to take depositions may issue "*subpœnas duces tecum* for the production of the books, papers, ballots, or things relating to such election; and they may compel the attendance of witnesses, and the production of every thing named in the *subpœnas*."

Section 2999 provides that:

"Whoever refuses to obey such *subpœna duces tecum*, or to produce any books, papers, ballots, or things in his possession, or under his control, named in such writ, shall be committed to the jail of the county by the justices or other officer, there to remain until he produces the things called for."

Section 3001 provides that:

"*On the trial* either party may introduce oral testimony, or depositions of witnesses taken as provided in civil actions; and whenever any omission, defect, or error occurs in the proceedings of an officer, in declaring or certifying that a person was duly elected to an office, the same may

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be corrected by oral or other testimony offered at the hearing of any preliminary proceeding, or at the trial."

These provisions, having been thus engrafted upon those for contest for membership of either house, furnish specific warrant for the action of the house in the case before us. This renders unnecessary any further discussion of the provisions of section 52, or the rules of the house, so far as they relate to commitment of witnesses for contempt.

4. The questions we have been considering were incidentally involved in the case of *Dalton, Clerk v. The State ex rel. Richardson*, 43 Ohio St. 652. This court there held that the jurisdiction conferred by the constitution upon each house to "judge of the election, returns, and qualifications of its own members," is supreme and exclusive, and that: "In a contest in either house, the broadest range is given contestants to purge the ballot and returns of the consequences of neglect, mistake, fraud, and crime, from the opening of the polls to the final declaration of the result."

The pertinency of this language to the case before us is emphasized by the fact that it was used with reference, among other things, to the very paper (then before this court) whose production was commanded by the subpoena issued in the case at bar. It was used to support the proposition that a contest before either house afforded a complete and adequate remedy for fraud, neglect, or crime at the election or in making up the returns thereof. If it be true that neither house of the general assembly has power to compel the production before it, or a committee acting for it, in the trial of a contest involving the election of a member, of the returns and other papers affecting such election, the declaration of this court in the case last cited is but a false pretense, and a contest in either house is not an adequate remedy for the contestant.

The parties to such a contest are entitled to the enlightened judgment of each member of the house upon the questions involved in the contest.

Where a full understanding of such questions requires a

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personal inspection of the returns of the election, it is the right of each party to the contest to ask that they be brought within reach of each member whose vote is to aid in the final determination of the contest. With the thoroughness of the investigation dependent wholly upon the pleasure or caprice of witnesses, and without the power to enforce their attendance and testimony and the production of papers, by such means, if necessary, as the house of representatives used in the present case, it would be worse than an absurdity to say, as did this court in the case last cited, that: "In a contest in either house the broadest range is given contestants to purge the ballot and returns of the consequences of neglect, mistake, fraud, and crime, from the opening of the polls to the final declaration of the result."

Judgment affirmed.

MANHATTAN LIFE INSURANCE COMPANY v. SMITH.

Life insurance—Notice to beneficiary of amount of premium due—When husband agent of wife—Attempt by husband to surrender policy—Tender.

1. Where, by the terms of a contract of life insurance, the beneficiary named in the policy is entitled to participate in the profits, a portion of which, in the form of dividends, is to be applied each year in reduction of premiums, and it has been the uniform practice of the company to give timely notice of the amount of premium, amount of dividends, and of the balance to be paid in cash, and the company neglects to give such notice, having knowledge of the residence of the beneficiary, and by reason thereof a premium is not paid at the time specified in the policy, the company can not set up such failure to pay as a defense to a recovery upon the policy, although by its terms the same is to be forfeited in case of failure to pay a premium upon any of the dates stipulated therein.
2. In such case, where the company has uniformly sent the notices to the insured (the husband of the beneficiary) and he has made payment of premiums from year to year, the law will treat him, in making such payments, as agent for the wife; but where it is shown to the company, by letters from the husband, very shortly after notice sent, that he and the wife have separated, she having commenced a proceeding for alimony against him, and that he is desirous of having the policy changed and

44	150
48	271
44	150
50	601
44	156
53	563
44	156
62	400

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made payable to his estate, the company is not justified in treating him as her agent, for the purpose either of receiving notice for her, or of making a surrender of the policy.

3. And, in such case, an attempt by the husband, without knowledge of the wife, to surrender the policy to the company, is inoperative, and the rights of the wife are not thereby impaired.
4. Where, in such case, the company repudiates the contract, and by its course of conduct clearly indicates that a tender of the premium after the death of the insured, if made, would not be accepted, a failure to make such tender will not bar a recovery on the policy.

MOTION for leave to file petition in error to the Superior Court of Cincinnati.

The material facts as shown by the record are as follows: June 4, 1863, the Manhattan Life Insurance Company issued to Rosehannah Smith an ordinary life policy upon the life of her husband, John W. H. Smith, of Cincinnati, Ohio, for three thousand dollars. The premium, \$75, was payable June 4th of each year, the beneficiary being entitled to participate in the profits, and the dividend each year to be deducted from the premium. The policy contained a forfeiture clause to the effect that if the premiums should not be paid when due, the company should not be liable for payment of the sum assured, or any part thereof, and the policy should cease and determine. The application is in the name of the wife. The first premium was acknowledged as being received from her and future premiums were to be paid by her. The husband kept the policy in his possession and transmitted to the company the premiums until and including the premium due June 4, 1879. In that year Smith and his wife had difficulty, and in the month of October she commenced an action in the court of common pleas of Hamilton county against him for alimony. They at that time parted, and did not afterward resume marital relations. Both lived in the city of Cincinnati, which had been their home during the existence of the policy, he being engaged in business at the corner of Fifth street and Central avenue. In the month of April, 1880, the husband received a notice from

the company, dated April 24th, informing him that the premium would be due the 4th of June following, and making this statement: Premium, \$75; less dividend, \$24; cash to be paid, \$51. The company had uniformly sent him a notice each year about the same length of time before June 4th, containing a similar statement, showing amount of premium, amount of dividend, and balance to be paid in cash, and the amount paid was uniformly the annual premium, less the dividend for the year.

Upon receipt of notice Smith wrote the company, under date of April 27th, asking if there was any way in which he could have the policy transferred; that he did not desire to continue it in its present form, as his wife was otherwise provided for, and asking if he could get a paid up policy. To this the company replied that the only change that could be made was to issue a paid up policy in its stead for \$810, without profits, and, that if he wished this, to forward the policy and renewals prior to June 4th. Smith responded by letter, of which the following is a copy:

“CINCINNATI, May 3, 1880.

“*Dear Sir*—In reply to your favor of April 29th, in regard to paid up policy, would say I desire to have it changed, and inclose the policy and renewals as requested. I will say that my wife has separated from me, and sued for alimony on the charge of not having provided for her. This is notoriously false, but, of course, does not particularly interest you. I greatly desire that the policy should be made payable to my estate, if it can be done, but, as I am obliged to provide for her with alimony, or otherwise support her, and as she is no longer a wife to me, I desire my children to have the benefit, if any. Some of the renewal receipts have been mislaid, but I return the last.”

This elicited from the company a letter dated May 6th, acknowledging receipt of the policy, stating that “no change can be made in this until the 4th day of June next, at which time we will give it our attention,” adding that

all the renewal receipts had not been returned, and requesting that careful search for the others be made and that they be forwarded. May 19th he wrote: "Replying to yours of 6th, I herewith inclose you all the certificates that I have been able to find." On the 26th the company again wrote to him: "We notice that the renewal receipts for the years 1865, 1869, 1870, 1871, 1873, 1874, and 1877 are missing, and request that you make a search for them, and failing to find them that you make an affidavit stating the circumstances of the loss and that search had been made." This ended the correspondence, and nothing further appears to have been done during Smith's life. Rosehannah Smith was not consulted, and had no knowledge of these negotiations. He died on the 11th of January following.

Besides the dividends the policy earned additions yearly; so that, at the time of the attempted surrender, Mrs. Smith would have been entitled upon surrender to a paid up policy for over eight hundred dollars. No paid up policy for any amount had been in fact written up to the date of Smith's death.

Rosehannah Smith was aware that a policy in this company on her husband's life for her benefit had been issued. She did not know its date, although she knew it had been in existence a good many years, nor did she know the amount of the premium nor when due. She received no notice from the company at any time, or from any source, as to the premium due June 4, 1880, nor did she know that any premium remained unpaid until a short time before suit brought. She has not paid that premium, nor tendered it, except that in her petition she offers to pay it in any way the court may direct. No notice of any intention to forfeit the policy was given her by the company. During the summer of 1880, and afterward, the company had an agent at Cincinnati. Mrs. Smith continued to reside there, and her place of residence was easily ascertainable.

This action is brought on the original policy to recover the three thousand dollars therein stipulated to be paid

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upon the death of John W. H. Smith. A verdict was rendered against the company for the above amount, less the premium due June 4, 1880, and interest, upon trial, in the superior court. Motion for new trial was reserved for decision of that court in general term. There the motion was overruled and judgment entered on the verdict

McGuffey & Morrill, for the motion.

Even although the husband could not put an end to the policy, he could dispose of it, except as to its equitable value based upon the premium paid. This is of the nature of an executed gift, of which he could not divest the wife by any arrangement with the company, but outside of this he could do as he pleased. *Bickerton v. Jacques*, 28 Hun, 119; *Gambis v. C. M. Ins. Co.*, 50 Mo. 44; *Clark v. Durand*, 12 Wis. 223; *Kerman v. Howard*, 23 Wis. 112; *Union Mut. Life Ins. Co. v. Slevin*, 19 Fed. Rep. 671; *Landrum v. Knowles*, 22 N. J. Eq. 594.

The prompt payment of the premium is of the essence of the contract, and the company has a right to plead forfeiture for non-payment, unless estopped by conduct which led to the failure to pay. *New York Life Ins. Co. v. Statham*, 93 U. S. 24.

As a general rule the company is not bound to give notice of the maturity of the premium.

"The company is under no obligation to give such notice and assumes no obligation by giving it. The duty of the assured to pay at the day is the same whether the notice is given or not. It makes no difference that the company has been in the habit of giving such notice." *Thompson v. Ins. Co.*, 104 U. S. 252.

"Testimony that the company was in the habit of giving such notice . . . is inadmissible unless it be shown that the notice has been purposely omitted with the design of forfeiting the policy." *Girard Life Ins. Co. v. Ins. Co.*, 97 Pa. St. 15.

The facts in the case at bar distinguish it from *Phœnix Ins. Co. v. Doster*, 106 U. S. 30, where the premium being

subject to a deduction equal in amount to the dividends, failure to give notice prevented a forfeiture.

In the latter case the company had been in the habit of sending notice and collecting premiums after due. It sent notice after the premium became due, but within the time it had been in the habit of receiving them, which notice, by mistake, it sent to the wrong address. The insured had made arrangements to pay and was awaiting notice. The beneficiaries tendered the amount of the premium three days after the death of the insured.

Here there has never been any tender, and the burden is on the beneficiary to show why. A valid excuse for not paying promptly on the day is a different thing from not paying at all. *Thompson v. Ins. Co.*, 104 U. S. 252.

But in contemplation of law she was notified. Notice to an agent is notice to the principal. Wharton on Agency, sec. 177.

There is no authority that the wife must be notified. Indeed, to hold that the company must notify any other party than the one with whom it has dealt is without authority; and such a rule would be impracticable of enforcement, especially when the beneficiaries were children.

The rule ought to go no further than to require notice to the party whose life is insured, he being the party who has procured, kept alive, and controlled the policy. Any other rule would work hardship and confusion.

The defendant in error was not misled by failure to receive notice.

The company did not know her address. It is pressing the point too far to hold that because the application, a dozen years earlier, stated her address to be in Cincinnati, notice should have been sent her there.

It is equally fallacious to claim that the company was bound to act upon the presumption that her residence was the same as her husband's. No such presumption exists after the husband has separated from the wife. *Mellen v. Mellen*, 10 Abb. N. Cas. 329.

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John W. Herron and Nathaniel H. Davis, contra.

The contract of insurance was between the company and Mrs. Smith. The application was made by her, the first premium was acknowledged as being received from her, and she was to pay the future premiums.

She was entitled, before the policy could be forfeited, to a notice as to when the premium was payable, and the amount to be paid.

The company was advised by the insured, a month before the premium fell due, that he was no longer the agent of his wife.

"Notice to the agent before the agency is begun or after it has terminated does not ordinarily affect the principal." Story on Agency, sec. 140.

It was the duty of the company to give notice of the time the premium was due and its amount. *Phoenix Ins. Co. v. Doster*, 106 U. S. 80.

No tender was necessary. The wife did not know that the premium was not paid until after the husband's death. No tender could then avail anything. As the company had repudiated the contract, no tender was necessary, and was useless after the death of the insured. *Isham v. Greenham*, 1 Handy, 361; *Brock v. Hidy*, 13 Ohio St. 310; *Bickett v. White*, 1 C. S. C. Rep. 175.

Forfeitures are not presumed. The law wishes to avoid them. *Ins. Co. v. Norton*, 96 U. S. 234; *Ins. Co. v. Pottker*, 33 Ohio St. 462.

It rests with the company to prove a forfeiture.

The insured can not make any contract or arrangement with the insured to affect the vested rights of the beneficiaries. *Bliss Life Ins. sec.*, 337; *Lemon v. Phoenix Ins. Co.*, 38 Conn. 294; *Ricker v. Ins. Co.*, 27 Minn. 193; *Pilcher v. Ins. Co.*, 33 La. 322; *Chapin v. Fellowes*, 36 Conn. 132; *Timayenis v. Ins. Co.*, 21 Fed. Rep. 223.

The company, by negotiating with Smith for a paid up policy and holding the matter under consideration until the day the policy was due, waived the forfeiture which might have arisen from the non-payment of the premium.

Bliss Life Ins., sec. 189; *Appleton v. Phoenix Mut. Ins. Co.*, 59 N. H. 541; *Viele v. Germania Fire Ins. Co.*, 26 Iowa, 9; *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117; *Ins. Co. v. Eggleston*, 96 U. S. 572; *Williams v. Bank of U. S.*, 2 Pet. 102.

No contract for a paid up policy was ever consummated. The paid up policy was not issued until after Smith's death.

There was no accord and satisfaction. *Ellis v. Bitzer*, 2 Ohio, 93; *Kromer v. Heim*, 75 N. Y. 574; *Panzerbeiter v. Waydell*, 21 Hun, 161; *Pettis v. Ray*, 12 R. I. 344.

SPEAR, J. At the outset we inquire: Had the husband, independent of any relation as agent for the wife, power to surrender the policy? He could stop paying premiums. That would have left the wife to continue the policy in force for its full amount by herself making payment of premiums; or, she could have declined to pay and receive a paid up policy for a lesser amount, and this she would do, not by the grace or favor of the company, nor yet by virtue of any new agreement with the company, but by force of the original contract and the law applicable thereto.

It is now too well settled to admit of dispute that a beneficiary for whose benefit a promise has been made by one upon a sufficient consideration moving from a third person, may maintain an action upon that promise; and if the beneficiary has acted on the promise so as to have changed position, or acquired a vested right, the contract can not be changed without his consent. The case at bar is a stronger case than the one supposed, in that the application was made in the name of the wife and the contract itself made directly with her, though the risk was on the life of the husband. There was value in the policy, and at least to that extent the wife's right in it was a vested right. She was the beneficiary named in it, and upon both reason and authority we think it clear that no new contract or arrangement of any kind which affects the vested rights of the beneficiary in the policy can be made with the company

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alone by the insured. Bliss on Life Insurance, sections 337, 345, 571, and the cases cited by counsel, abundantly sustain this position. We conclude that the husband, in this case, had no power to surrender the policy merely because he was the insured party and had paid premiums. Had he any other standing regarding the transactions which gave him such right? In the payment of premiums he, in law, was her agent. If he had the right to act for her at all it was because of this relation as agent. Was he her agent at the time he attempted to surrender this policy? and what was the company, with the knowledge furnished by the letters as to his attitude toward his wife, bound to understand? By his letter of April 27th, in which he inquired if the policy could be transferred, he gave the company to understand that he was seeking a result on the face of the transaction inconsistent with her interests. This was, of itself, significant and suggestive. And when it was followed by the letter of May 3d, giving the information that his wife had separated from him and sued for alimony, and renewing his request that the policy be made payable to his estate because he was obliged to provide her with alimony and because she was no longer a wife to him, it is idle to claim that the company was not apprised of facts from which it was bound to presume that his relation of agent had ceased. He could not have made the fact clearer had he included a direct statement to that effect. The relation of principal and agent implies trust, confidence. Here was antagonism, and a direct effort to sacrifice her rights for his benefit. The company was bound to know that as agent he could not lawfully do that. The husband not having any authority then, either by reason of having paid premiums, or by his position as the insured in the policy, nor yet as agent for the wife, to make a surrender, it follows that the attempted surrender of the policy was inoperative, and that the rights of the beneficiary were not impaired by the attempt.

But the company claims that, independent of the question of surrender, there can be no recovery beyond the

sum of \$810, because the policy was forfeited by the failure to pay the premium due June 4, 1880. To this it is replied that there could be no forfeiture without notice to the beneficiary, such as had been uniformly given during the entire life of the policy, and that she had not, up to the commencement of the suit, been notified either of the amount of the premium to be paid, or of any purpose on the part of the company to forfeit the policy. On this question of notice the company insists that the notice given the husband was, in law, a notice to the wife, for that, whatever was the fact as to his agency at the time his letters to the company were written, they do not show *when* the separation took place, and for all that appears, it was after the notice of April 24, 1880, was received by him. We confess we are unable to perceive the force of this claim. As early as the 29th of April, five days after the notice was mailed, the company was apprised that Smith was acting contrary to the interest of his wife, and seven days later a full disclosure of his purpose was made. In the light of these facts, and of the irresistible inferences to be drawn from them, it will hardly do to claim seriously that the company was justified in assuming that he was agent for the wife April 24th. As matter of fact, the alimony suit had then been pending about six months. It being shown, therefore, that notice to the husband was not notice to the wife, and it appearing further that she had no actual notice, we are led to inquire what effect this state of facts has upon the rights of the parties?

It will be borne in mind that by the contract Mrs. Smith was entitled to share in the profits of the company, and that, as to part of these profits, they were paid out by annual dividends, the remaining portion being retained by the company and inuring to her benefit by accretions to the policy, and that the uniform custom had been that the company should give timely notice, not only of the date when the amount to be paid as premium would become due, but as well the amount of the dividend and the amount of balance to be paid in cash. What dividend in any year was

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declared, and what amount could be used to reduce the premium were facts known to the company, but not to the insured. Without this information the insured or beneficiary could not, in the ordinary course of business, know how much was to be paid as premium each year, and could not, therefore, pay it. The case is to be distinguished from one where the premium is a fixed amount; and from a case, slightly differing, where, although there may be dividends which the policy-holder, at his option, may have applied as the premium, yet there is no agreement and uniform practice that the dividends are to be deducted each year from the premium and the balance only paid to the company. It may, probably, be safely conceded that in either of the two supposed cases the assured would have no right to depend upon a notice from the company, not even if the company had ordinarily sent such notice. For the very life of successful life insurance depends upon prompt payment of premiums, and their business would be thrown into utter confusion if companies had no means of protecting themselves by forfeiture for non-payment of premiums. But, while this is true, the contract is nevertheless an entire one of assurance for life, and the payment of the premiums, after the first, is not a condition precedent, but a condition subsequent, and the parties may deal in such way between each other as to estop the company from insisting upon a forfeiture where it would be inequitable for a forfeiture to be declared.

Can the company insist upon a forfeiture in this case? The premiums were paid regularly for sixteen years; the company undertook to make a new contract with a person wholly without authority to act for Mrs. Smith, ignoring her altogether; her residence was given in the application as at Cincinnati, and the presumption would be that she continued to reside there; the exact place of residence was not hard to find; the company had an agent in the city all the time, and could, without trouble, have given her notice, but no effort even of the slightest character was made to acquaint her with that which she, of all persons, was interested

in knowing and entitled to know. Courts are liberal in construing transactions in favor of the avoidance of a forfeiture. There are no presumptions in favor of a right by forfeiture, for forfeitures are abhorred in equity, and are never favored in law. Upon the facts shown it appears manifest that this claim of the insurance company is inequitable, and we are of opinion that it is not maintainable in law.

A recent case decided by the supreme court of the United States is believed to entirely cover the question here involved as to the effect of failure to give notice. We refer to *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, and quote from it sufficiently to show its application to the case at bar. The policy was issued September, 1871, upon the life of Jackson Riddle, in consideration of the payment by the wife and children of the insured (who were named as payees in the policy) of the sum of \$215, and the annual payment of a like amount on or before the 20th of September in every year during its continuance, and contained a stipulation that if the premiums be not paid on or before the day of maturity the company should not be liable for any part of the sum insured, and the policy to cease and determine, all previous payments being forfeited. The policy was upon the half-note plan, which gave the insured the right to discharge one-half of the first four premiums by notes, and upon the fifth and subsequent payments to have his dividends, if any, applied in reduction of the premiums. Notices were sent to the insured prior to the 20th of September in 1872, 1873, and 1874, showing when premiums became due, amount of cash to be paid, interest on the notes, and amount for which additional note was required. Prior to the 20th of September, 1875, notice to the insured was sent, which stated amount of dividend to be applied in reduction of that premium, interest to be paid on notes previously executed, and the sum to be paid in cash.

On the 6th of October, 1876, the insured lost his life in a railroad accident, leaving unpaid the premium due on the 20th of September previous, though before starting from

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home he had made arrangements to pay the amount required as soon as notice was received. His residence and post-office for more than a year had been at Oxford, Ind., which was known to the company's general agent at Chicago. On the 4th of October, 1876, there was sent from the general agent's office, addressed, by mistake, to the insured at Fowler, Ind. (where he never resided), a notice similar to that given in 1875. This was received by a son of the insured the day the father was killed. On the 9th of October, 1876, the amount due was tendered to the company's general agent at Chicago. He declined to receive it, on the ground that the policy lapsed, by reason of non-payment of premium due, the 20th of September, 1876.

On the trial in the circuit court the court charged the jury, among other things, to the effect that "if they found from the evidence that it had been the invariable custom of the company to transmit to the insured a statement of the amount of the premium due, after deducting the dividend, with a notice of the time when, the place where, and the person to whom, the premium could be paid, then the insured had good reason to expect and rely on such statement and notice being sent to him; and that if the company, by its managing agent, had notice of the post-office address of the insured before the usual time of sending out notice, but failed and neglected to transmit such statement and notice until the 4th of October, and the same did not reach him or the payees in the policy until the 6th, and that the insured or payees were ready and waiting to pay said premium when notice and statement should be received, and by reason of such failure to send the notice and statement, and of that alone, the premium due in September, 1876, was not promptly paid; and that in a reasonable time thereafter the payees tendered the full amount of the premium, then the policy did not lapse or become forfeited, notwithstanding the premium was not paid on the day named in the policy, and in the life-time of the insured."

A judgment was rendered against the company and the case taken upon error to the supreme court. The opinion was delivered by Mr. Justice Harlan, who, in commenting upon this part of the charge, uses this language: "We are of opinion that these propositions are substantially correct. Nor do we perceive that the rulings of the court below are in conflict with our decision in *Thompson v. Ins. Co.*, 104 U. S. 252. . . . The present case has features which plainly distinguish it from the Thompson case. In the former there was a tender of the premium within a few days after the death of the insured, and as soon as the payees ascertained the sum required to be paid. In the latter, the amount to be paid was fixed. It was not liable to be reduced on account of dividends, or for any other reason, and the insured, therefore, knew the exact amount to be paid in order to prevent a forfeiture of the policy. Now, although the policy issued upon Riddle's life required payment annually of a specific sum as a premium, that stipulation must be construed in connection with the agreement set out in the application, that the premium might be discharged *pro tanto* by such dividends as were allowed to the insured from time to time. Whether the company, in any particular year, declared dividends, and what amount was available in reduction of the premium, were facts known, in the first instance, only to the company, which had full control of the matter of dividends. It certainly was not contemplated that the insured should every year make application, either at the home office or at the office of its general agent in Chicago, in order to ascertain the amount of dividends. The understanding between the parties upon this subject is, in part, shown by the practice of the company. Independently of that circumstance, and waiving any determination of the question whether the forfeiture was not absolutely waived by the act of the general agent, in sending notice to the insured after the day fixed for the payment of the premium due September 20, 1876, it was, we think, the company's duty, under any fair interpretation of its contract, having received information as to the post-

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office of the insured, to give seasonable notice of the amount of dividends, and thereby inform him as to the cash to be paid in order to keep alive the policy. It did, as we have seen, give such notice in 1875, and received payment of the amount due after the date fixed in the policy. Within a reasonable time after the notice for 1876 came, in due course of mail, to the hands of one of the payees, a tender of the amount was made to the general agent at Chicago. No such features were disclosed in the Thompson case, and they are, as we think, sufficient not only to distinguish the present case from that one, but to authorize the instructions of which the company complains. . . . Judgment affirmed."

Undue importance must not be given to the fact of preparation by the insured for the payment of premiums before leaving home. The date of leaving home is not disclosed, and for aught that appears the preparation may have been made after the 20th of September. At best its tendency was but to show readiness on his part to comply. The fact is not alluded to at all by Justice Harlan in his comments upon the action of the court below. It will be observed that a point of difference in the two cases is that in the Riddle case tender was made; in this case it was not. But it must be kept in mind that a notice which the company's agent sent actually reached one of the beneficiaries the day of his father's death, and he had, therefore, the information on which to act. Mrs. Smith had no information, and the neglect of the company was the cause of that ignorance. The beneficiary in the Riddle policy was apprised of the sum to be paid and that it was due; the beneficiary in the Smith policy was kept in ignorance of that sum and of time for payment. There are other questions involved in the Riddle case, but they are not believed to at all affect the case before this court.

The action of the company in the case at bar was in effect a repudiation of its promise to pay the amount stipulated in the policy. Even had Mrs. Smith learned the amount and time of payment after the death of her hus-

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band, a tender would have been a useless ceremony. "On general principles, whenever the act of one party, to whom another is bound to tender money, services, or goods, indicates clearly that the tender, if made, would not be accepted, the other party is excused from technical performance of his agreement. The law never requires a vain thing to be done." *Isham v. Greenham*, 1 Handy, 361. See also *Brock v. Hidy*, 13 Ohio St. 310. Notice was essential to a forfeiture. The company gave none, and by its course of action waived the forfeiture which might have arisen from non-payment of premium due June 4, 1880, and it is now estopped from setting it up.

We are aware that the views herein expressed as to the effect of failure to give notice are not in accord with a number of reported cases, but they are directly supported by the decision of the highest court in the land, and inferentially by decisions of many other courts, and we believe they rest upon the firm ground of sound principles. There was no error in the instructions given the jury at the trial, nor in the refusals to charge as requested; and an examination of the record discloses no error in the admission or exclusion of testimony prejudicial to the company. It follows that the action of the court at general term in overruling the motion for new trial and entering judgment on the verdict was not erroneous.

Motion overruled.

JOHNSON, J., did not sit in this case.

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DODD v. BARTHOLOMEW.*Written instrument—Mistake in name—Validity.*

1. Where an error occurs in the name of a party to a written instrument, apparent upon its face, and, from its contents, susceptible of correction, so as to identify the party with certainty, such error does not affect the validity of the instrument.

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2. Charles A. Clark and Sarah Clark, his wife, executed and delivered, in due form of law, a mortgage to S., signing and sealing it as "Charles A. Clark" and "Sarah Clark;" but in the granting, defeasance, and testatum clauses, Charles A. Clark is described as Charles B. Clark, and his wife, although properly described in the granting clause as Sarah Clark, is described as Mary Clark in the testatum clause. In the certificate of acknowledgment the officer certifies that "the above named Charles B. Clark and Mary Clark, his wife, the grantors in the above instrument," personally came before him and acknowledged the signing and sealing of the same; and further, that "the said Mary Clark, wife of the said Charles A. Clark," was examined separate and apart from her said husband. *Held*, that the errors in the names of the grantor and his wife, in the several clauses of the deed, and in the certificate of acknowledgment, are apparent upon the face of the instrument, and that the contents show, with certainty, that the persons, Charles A. Clark and Sarah Clark, who signed the deed as grantor and wife, are the same persons elsewhere described in the deed as Charles B. Clark and Mary Clark; and that the deed so executed and delivered, having been recorded, is a valid mortgage, not only against the makers, but against all subsequent lien-holders, by mortgage or otherwise.

ERROR to the District Court of Licking county.

In January, 1876, Frederick Schuler and his wife conveyed a certain lot in the town of Newark to Charles A. Clark, and at the same time the latter with his wife Sarah, to secure a part, \$325, of the purchase-money, executed and delivered a mortgage on the property to the vendors.

The mortgage was duly executed and acknowledged; but, by a mistake of the scrivener in drafting it, Charles A. Clark was described in the granting, defeasance, and testatum clauses as Charles B. Clark; and his wife, Sarah Clark, though properly described in the granting clause, was described as Mary Clark in the testatum clause; but the deed is properly signed and sealed by each respectively as Charles A. Clark and Sarah Clark.

In the certificate of acknowledgment, the justice of the peace certifies that, personally came before him "the above named Charles B. Clark and Mary Clark, his wife, the grantors in the above named instrument," and acknowledged the signing and sealing of the same; and that the

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said *Mary Clark*, wife of the said *Charles A. Clark*, was examined separate and apart from her husband.

Subsequently to the execution and record of the above mortgage, *Clark* and wife, on February 23, 1876, executed and delivered to *Samuel Dodd* a mortgage on the same property to secure the payment of \$190, which was duly recorded. Afterward the debt to *Schuler* not being paid, and *Clark* having died, *Schuler* commenced a suit in the court of common pleas, for the correction and foreclosure of his mortgage, against the widow and heirs of the decedent; and such proceedings were had that a decree was made accordingly, which was assigned by *Schuler* and wife to *Bartholomew*, the defendant in error. Afterward, and while the money derived from the sale of the land was in court, *Dodd*, by its leave, became a party and filed an answer and cross-petition, upon which *Bartholomew* was made a party, who also answered. Each claimed priority over the other, the latter, not only on the ground of the prior execution and record of the mortgage of his assignors, but also on the ground that the assignment of the judgment and decree, previously entered in favor of *Schuler* and wife, carried with it their lien for the unpaid purchase-money, intended to be secured by the mortgage. The contention was determined by the judgment of the court in favor of *Dodd*, and *Bartholomew* appealed to the district court of the county where it was determined in favor of the appellant; and this proceeding is now prosecuted in this court to reverse the judgment of the district court and affirm that of the common pleas.

J. R. Stanbery, for plaintiff in error.

The *Schuler* mortgage is not a lien as against *Dodd*, because it was not properly executed and acknowledged, and because it contained the names of persons as grantors who did not own the lands, and it was not acknowledged as the statute directs by the grantors.

A defectively executed mortgage, as between the parties, may be treated as an agreement for a mortgage and the

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agreement specifically enforced. *Bloom v. Noggle*, 4 Ohio St. 46.

Dodd is a stranger to both the mortgage and decree, and can not be affected by them, even although he had notice of the agreement. Such agreement created no lien. *Erwin v. Shuey*, 8 Ohio St. 510; *White v. Denman*, 16 Ohio, 60; s. c., 1 Ohio St. 110; *Smith v. Hunt*, 13 Ohio, 260; *Johnston v. Haines*, 2 Ohio, 55; *Mayham v. Coombs*, 14 Ohio, 429.

A vendor's lien is an equity personal to the vendor, and is not assignable. *Jackman v. Hallock*, 1 Ohio, 818; *Tierman v. Beam*, 2 Ohio, 383; *Brush v. Kinsley*, 14 Ohio, 21.

If, then, the assignee of note or mortgage to secure a vendor's lien can not take the vendor's equity by assignment, how can he acquire such an equity when the lien is merged in judgment? If he can not take title to the evidences of the judgment, he can not acquire it by assignment of the judgment itself, for that is founded upon things not assignable, and is the same as the evidence. *Unger v. Leiter*, 32 Ohio St. 212; *McArthur v. Porter*, 1 Ohio, 99; *Taylor v. Foote*, Wright, 356.

Charles H. Kibler, for defendant in error.

The mortgage of Clark and wife was valid in its execution and acknowledgment. It was sealed, signed by Charles A. Clark and Sarah Clark (the proper names of the mortgagors), and the proper officer signed the certificate of acknowledgment. There were no such defects as appear in *Johnston v. Haines*, 2 Ohio, 55; *Miami Exporting Company v. Gano*, 13 Ohio, 269; *White v. Denman*, 16 Ohio, 59; *Cin. W. & Z. R. Co. v. Clinton Co.*, 1 Ohio St. 100; *Cincinnati v. Bickett*, 26 Ohio St. 49; *Barry v. Hovey*, 30 Ohio St. 347.

In those cases the defects were in the *execution*.

The objection to the fact that the name of the mortgagor is called Charles B. Clark in the body of the instrument is not tenable. The defect is cured by his proper signature. "As to the name of the grantor, his signature

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fixes the actual identity of the person." Jones on Mort., sec. 63; *Gould v. Barnes*, 3 Taunt. 505.

The last statement of fact or intention often governs. It is the name signed to the instrument which has force. Mistakes which are apparent are immaterial. *Turnpike Co. v. Brush*, 10 Ohio, 111; *Fosdick v. Perrysburg*, 14 Ohio St. 472.

The first name is correct. The middle letter is not necessary and is immaterial, unless it were shown that there was another person connected with the title whose name was Charles B. Clark. *Franklin v. Talmadge*, 5 John. 84; *Roosevelt v. Gardinier*, 2 Cow. 463. And see also *Hitesman v. Donnell*, 40 Ohio St. 287; *Mack v. Schlotman*, 7 Am. L. Rec. 665; *Jackson v. Bonenam*, 15 John. 226; *Jackson v. Cody*, 9 Cow. 140; *Jackson v. Hart*, 12 John. 76.

Charles A. Clark would not be permitted to deny that it was his valid mortgage. 1 T. Raymond, 2; 1 Salk. 214; *Gould v. Barnes*, 3 Taunt. 505.

Schuler and wife had a vendor's lien if the mortgage was defective.

MINSHALL, J. The claim of the defendant in error, that he is entitled to a priority on the Schuler mortgage over that of Dodd, is placed on two grounds.

1. That the judgment assigned to him by the Schulers carried with it their lien for the purchase-money of the mortgaged property, of which, he claims, Dodd had notice.

2. That the Schuler mortgage is, without any reformation by the court, a valid one. Being persuaded that the latter claim is correct, it is unnecessary to consider the former one.

It is a well settled principle, applicable to the construction of deeds and other instruments, that all their parts are to be construed together, and the meaning ascertained from a consideration of each and every part; and, in the application of this rule, it is uniformly held that a false description, whether of the subject-matter or of the parties, does not vitiate the instrument where the error appears upon its

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face and the instrument supplies within itself the means of making the correction.

This principle was applied in *Poland v. Connolly*, 16 Ohio St. 65, to a misdescription of the property in a resolution for the abatement of a nuisance on real estate; in *Milford & C. Turnpike Co. v. Brush*, 10 Ohio, 111, to a misdescription of the corporation in a subscription to its stock; in *Fosdick v. Village of Perrysburg*, 14 Ohio St. 473, to a misdescription of the obligor of a bond, it being described as "the town," instead of "the incorporated village, of Perrysburg;" and in *Hiesman v. Donnell*, 40 Ohio St. 297, the name of the grantee, to whom the conveyance was intended to be made as trustee, was left blank, but the instrument, a trust mortgage, containing within itself all that was necessary to indicate how the blank should be filled, the court held that it created a valid lien on the lands as a mortgage from the date of its filing for record.

In the case now under review the mortgagor, with his own hand, signed his name to the instrument as "Charles A. Clark" and sealed it, and his wife, likewise, signed her name as "Sarah Clark" and sealed it. In the certificate of acknowledgment the officer certifies that "the above-named grantors" personally came before him and acknowledged the signing and sealing of the same; but, through a mistake of the scrivener, the one is described as Charles B. and the other as Mary Clark, and similar errors occur in the body of the deed; but in all instances Charles B. Clark is further described as the grantor and Mary Clark as his wife. In a note to section 63 of Jones on Mortgages it is said, by the author, that the signature of the grantor or mortgagor fixes the actual identity of the party. So that there is no want of certainty as to the grantors in the deed; they are Charles A. Clark and Sarah Clark, his wife, and any errors occurring in the name of either, in other parts of the instrument, are corrected by their signatures to it.

The question presented here is very different from that where an error occurs in the execution of the instrument. The formalities required in the execution of a mortgage are

prescribed by statute, and can not be dispensed with. To be a valid instrument, as against third persons, a mortgage must be signed, sealed, and acknowledged as required by statute. But the form of the instrument is not so prescribed. The form and requisite certainty of it is left to the general rules of law. *Hurd v. Robinson*, 11 Ohio St. 232. It is observed by Gholson, J., in delivering the opinion that "the inconvenience that may occasionally arise to third persons from uncertainty of description is more sufferable than the gross injustice which would be frequently inflicted by a stringent rule as to certainty."

And in *Strang v. Beach*, 11 Ohio St. 283, Brinkerhoff, J., delivering the opinion, observes that the statutes relate solely to the execution and recording of the mortgage, and that it is settled that a mistake in these respects can not be corrected, but adds: "As to all mistakes and defects of the instrument, in other respects, the statutes are entirely silent, and upon them the decisions which have been made upon questions arising under these statutes have no bearing."

In each of the cases cited by counsel for the plaintiff in error there was a defect in the execution of the mortgage. In *Barry v. Hovey*, 30 Ohio St. 347, the mortgage had but one witness. In *White v. Denman*, 16 Ohio, 60, there was but one subscribing witness. In *Erwin v. Shuey*, 8 Ohio St. 511, there was no seal. In *Bloom v. Noggle*, 4 Ohio St. 46, there was only an agreement for a mortgage. In *Johnston v. Haines*, 2 Ohio, 55, the official character of the officer taking the acknowledgment had been omitted, and nothing appeared on the face of the acknowledgment by which this could be supplied.

In *Smith v. Hunt*, 13 Ohio, 260, the name of the grantor was left blank in the certificate of acknowledgment, and did not, as in this case, refer to him as the above named grantor.

Our conclusion is that the mortgage executed by Clark
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and wife to Schuler and wife became a valid lien on the property from the time it was delivered for record, and was, therefore, prior in lien to the one subsequently executed by them to Dodd.

Judgment affirmed.

TUTTLE v. NORTHROP.

Guardian and ward—Liability of substituted surety for previous sale of real estate by guardian.

1. On December 28, 1872, Northrop was appointed guardian of an imbecile; he gave bond with Belden and Tice as sureties, and entered upon his trust. At sundry times thereafter, by order of court, he sold real estate of his ward, and at each sale gave the special bond required by law. He received in cash the proceeds of the land sales, and he also received a small amount for the rents of real estate. After the proceeds and amounts were so received, Belden was released as surety, and Northrop gave a new bond, with Tice and Taylor as sureties, and he continued in his trust. Northrop resigned, and settled his accounts with the court, which found a large amount due from him to his ward, and ordered the same paid to his successor. Thereupon Northrop paid the greater part of the amount due, but he made default as to the residue, and his successor brought suit on the last general bond, against Northrop as principal, and Tice and Taylor as sureties. *Held*, The sureties on such bond are liable for the unpaid residue, whether or not the same is partly or entirely the proceeds of the sale of such real estate.

RESERVED in the District Court of Lake county.

On December 28, 1872, Albert B. Northrop was appointed guardian of Emily Belden, an imbecile, and gave bond, with C. Tice and A. N. Belden sureties. On September 29, 1877, Belden applied to the court to be released under section 6273 of the Revised Statutes, and on October 13, 1877, he was released upon Northrop giving the bond in suit, which is as follows:

“Know all men by these presents: That we, A. B. Northrop, as principal, C. Tice and S. B. Taylor as sureties,

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are held and firmly bound unto the state of Ohio in the sum of eight thousand dollars, for the payment of which we hereby jointly and severally bind ourselves, our heirs, executors and administrators. Sealed with our seals and dated at Painesville, this 13th day of October, A. D., 1877. The condition of the above obligation is such that, whereas, the above bound A. B. Northrop has heretofore been appointed by the probate court of Lake county, Ohio, guardian of the person and estate of Emily Belden, a person of unsound mind, of Willoughby, in said county, which appointment the said A. B. Northrop has accepted. Now, if the said A. B. Northrop shall faithfully discharge all of his duties as such guardian as is required by law, then the above obligation to be void; otherwise to remain in full force.

A. B. NORTHROP, [SEAL.]

C. TICE, [SEAL.]

S. B. TAYLOR. [SEAL.]”

Thereupon Northrop continued in the guardianship until March 5, 1879, when he resigned, and his accounts were settled, and \$9,443.44 was found due from him, as guardian, to his ward, which was ordered paid to his successor. He paid \$7,365.28, January 3, 1880, and failed to pay the residue and interest, \$2,503.11, for which this action is brought on the above bond.

Northrop became insolvent and he did not answer. Several matters in the pleadings are not before this court. The matters of defense, relied upon by Tice and Taylor, are as follows: That whatever rents and profits of the ward's real estate that came into the guardian's hands were paid and expended by him in full for taxes on the real estate, and for current expenses of and for the support of his ward prior to the giving of the bond in suit.

And defendants further say that no part of the amount found by the probate court, to wit, of the sum of \$9,443.44, to be due from Northrop, as such guardian, on the settlement of his account, in March, 1879, was either

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directly or indirectly, in whole or in any part thereof, made up of or comprised any rents or profits which came to the hands of Northrop, as guardian, from the real estate of the ward.

And the defendants further say that Northrop, as such guardian, received and there came into his hands, on the 12th day of December, 1873, the sum of \$6,000, which was derived entirely from the sale of real estate of the ward under the order of the probate court, made on the 11th day of December, 1873, in a proceeding to sell real estate then pending in said court. That in the proceeding to sell real estate, a special bond was required and executed by the guardian, according to law, for the sum of \$12,000, with J. S. Ellen and G. W. Storm as his sureties, and was duly accepted and approved by the court.

And the defendants further say that Northrop, as such guardian, received and there came into his hands, credits to the amount of \$2,000, on the 21st day of June, 1875, which was wholly derived from, and which was the proceeds of the sale of certain other real estate of his ward, under another and further order of the probate court, made June 21, 1875, in a certain other proceeding commenced by the guardian to sell the real estate of his ward.

That in said proceeding a special bond in the sum of \$4,000 was required by the court and executed by the guardian, according to law, with C. C. Townsen and Thomas J. Bradbeer as his sureties, and which bond was duly accepted and approved by the probate court.

And the defendants further say that Northrop, as such guardian, received and there came into his hands, on the 17th day of August, 1876, the sum of \$8,500 in cash, which was wholly derived from, and which was, the proceeds of the sale of certain other real estate of his ward, under the order of the probate court, made August 15, 1876, in a certain other proceeding commenced by the guardian to sell the real estate of his ward.

That in the proceeding a special bond in the sum of \$17,000 was required by the court and executed by the

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guardian, according to law, with Ransom Kennedy and G. W. Storm as his sureties, which bond was duly accepted and approved by the probate court.

And further answering, the defendants say that said sums thus derived from the sale of real estate, and the rents and profits, were and are the only assets and property of said ward which came into the hands of Albert B. Northrop during the whole period of his guardianship. And that the entire sum of \$9,443.44, found due from and ordered by the probate court to be paid by Northrop, as such guardian, in 1879, in March, and the entire balance of \$2,503.11, sued for in this action, is made up and composed wholly of the proceeds of the sale of real estate. It is admitted that the sum of \$7,365.28 was paid over to the plaintiff by Northrop, and that there is still due and unpaid to plaintiff, as guardian of Emily Belden, from Northrop, the sum of \$2,503.11.

And the defendants say that the bond in suit, signed by them, was signed and executed by them as the sureties of Albert B. Northrop, who was and is the principal therein. That the bond is a general and not a special bond, and covers and contemplates only a breach and violation of the general duties of such guardian, and not any of the special duties by law imposed upon him on the sale of real estate, and covers and contemplates only a failure of such guardian to perform his duties and pay over moneys derived from the sale of personal estate and rents and profits which came into his hands, and does not contemplate or embrace any failure to pay over moneys derived from the sale of real estate, or any breach of his duty in that behalf; but that the remedy of said plaintiff guardian, if any, is upon the bond severally executed in the proceedings to sell the real estate of said ward, by Northrop, as her guardian.

Demurrers to these answers were overruled by the court of common pleas, and judgment for costs was rendered for Tice and Taylor. On proceedings in error the district court reserved the same for decision here.

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Perry Bosworth and W. D. Pudney, for plaintiff in error.
Alvord & Alvord and Morrow & Morrow, for defendants
in error.

FOLLETT, J. Are Tice and Taylor liable on this bond for the \$2,508.11 and interest due from Northrop to his ward?

The amount due is not disputed. It is admitted to be a part of the proceeds of real estate sold by order of court; but from which sale the guardian obtained this amount due, we are not told. These sureties do say, that there came into Northrop's hands, as guardian, on August 17, 1876, the sum of \$8,500 in cash. This was from the last sale of land. He may have received thereafter some small sums of money for rent.

This bond was given October 13, 1877, and after the property had been changed from realty to personalty. There is no statute of Ohio that requires such proceeds to be regarded as realty for any purpose.

In case of sale by an executor or an administrator to pay debts, section 6171 of Revised Statutes requires "the surplus of the proceeds of the sale remaining on the final settlement of the account, shall be considered as real estate, and shall be disposed of accordingly." And though this surplus goes to the heirs in the line that real estate would go, such proceeds are personalty and are held as personalty by the heir and as such pass from such heir. See *Pence v. Pence*, 11 Ohio St. 290, and *Oxeniden v. Lord Compton*, 2 Vesey, Jr. 69.

On his final settlement, Northrop must have had "*in his hands*" at least the \$7,365.28, which the sureties admit he paid to his successor. And as this payment was made on the entire amount due, it may be applied, in the interests of the beneficiary, to the payment of any amount *not* in his hands at settlement. So this residue sued for was received by Northrop in cash, and so remained in his hands on giving this bond and on his settlement. Sureties are held by the terms of the bond.

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These sureties bound themselves in the sum of \$8,000, with the condition: "Now if the said A. B. Northrop shall faithfully discharge all of his duties as such guardian as is required by law, then the above obligation to be void; otherwise to remain in full force."

Among other things it "is required by law" (sections 6269, 6304 of the Revised Statutes) of the guardian that: "At the expiration of his trust, fully to account for and pay over to the proper person all of the estate of his ward remaining in his hands." This language is very comprehensive, and includes whatever may be a part of an estate, whether derived from personalty or realty. Whatever is the nature or source of any part of the estate, the guardian is not required to keep separate accounts, but he is required to render "an account of the receipts and expenditures of such guardian;" *one* account of all receipts and all paid out.

We have been referred to the decisions of courts in other states; but their laws and decisions can not control our statutes. In some states, as in Massachusetts, the statutes have been changed so as to require in a guardian's general bond the specific condition, "to render an account of the proceeds of all real estate sold by him for investment, and at the expiration of his trust pay the same over," etc. The bond in this case includes all such proceeds.

There is no question before us that involves the extent of the liability secured by each special bond, or what, if any security, such special bonds afford the ward or the general bondsman.

And this case does not involve the proceeds of land sold after the general bond was given.

The ward or the present guardian can not know the amount due until the former guardian has settled his accounts.

This court has held, in *Newton v. Hammond*, 38 Ohio St. 430: "A right of action on a guardian's bond to recover from the sureties the amount remaining in the hands of the guardian, first accrues to the ward when such amount is as-

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certained by the probate court on the settlement of the guardian's final account."

The plaintiff delayed suit until the amount due was so ascertained. There is no claim that any one asked that other bondsmen should be made parties to the suit.

Tice and Taylor are liable on this bond to the plaintiff for the amount unpaid. The court erred in overruling plaintiff's demurrer to the first defense in the answer of Taylor, and the demurrer to the first and second defenses in the answer of Tice.

Judgment reversed and cause remanded, with instructions to sustain the demurrers, and for further proceedings.

McCLELLAN v. FILSON.

Section 6090, Revised Statutes—Liability of estate of married woman for funeral expenses and those of last sickness.

1. Section 6090, Revised Statutes, which directs the payment of funeral expenses and those of last sickness, may apply to the estate of a deceased married woman, though such deceased left surviving her a husband having property.
2. In such case, where it is shown that the physician, who attended the deceased in her last illness, was called at her request under such circumstances as to warrant a charge against her, and that the purchase of coffin and other necessary articles for the funeral, being suitable to the station of the deceased, were made by the executor, such executor may properly allow such expenses, and pay them from the assets of the estate.

ERROR to the District Court of Greene county.

The facts are stated in the opinion.

Nesbitt & Martin, for plaintiff in error.

Little & Shearer, for defendant in error.

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SPEAR, J. The facts shown by the record, so far as they are necessary to an understanding of the points decided, are as follows: Nancy McClellan, a married woman, died about January, 1879, testate, leaving an estate of her own, and a husband surviving her, who also had property. The will named as executor Wm. S. McClellan, a son of the testatrix, who upon the probate of the will, took out letters testamentary, and at once entered upon the discharge of the trust. As such executor he paid from the assets of the estate, as expenses of the last sickness, physicians' bills; also expenses of her funeral, and for a tombstone. The physicians who attended were called by the son (William S.) at request of the mother. The coffin and other purchases for the funeral were made by the son. It does not appear that the husband took any action in the way of employing either the physicians or undertaker. The executor also claimed to have paid certain taxes on the lands of deceased during her life, a portion of them more than six years before the death of the testatrix.

To the account of the executor filed in the probate court asking credit for all these payments, Mary J. Filson, a daughter of Mrs. McClellan, and legatee under the will, filed exceptions, in which, among other grounds of exception, she urged as to divers items of taxes, that they were barred by the statute of limitations. The probate court sustained all the exceptions. On appeal to the common pleas by the executor, that court upon trial sustained the exceptions as to the charges for expenses of last sickness and of the funeral, and overruled them as to the tombstone and the charges for taxes. The district court reversed the judgment of the common pleas as to the items of taxes, to which the statute of limitations had been pleaded, and affirmed the judgment of the common pleas in all other respects. To reverse this judgment of reversal the present proceeding in error is brought.

We think the executor was justified in paying the funeral expenses and those of last sickness, and that he should have been allowed for such items in his settlement.

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The contention is that he was not so justified, because the expenses were a debt against the husband and the executor should have compelled the undertaker to look to him. As to expenses of the funeral. Section 6090, Revised Statutes, provides that every executor shall proceed with diligence to pay the debts of the deceased, and shall apply the assets in payment of debts: *First*. The funeral expenses, those of last sickness, and the expenses of administration. *Second*. The allowance made to the widow and children for their support for twelve months. Another section permits the executor to sell property of the estate before letters testamentary are granted to pay funeral expenses, but for no other purpose. If within the meaning of the statute the funeral expenses are to be considered as debts of the deceased woman there would seem to be reason for regarding the statute as imperative. They manifestly can not be treated as contract debts, but that, as regards the estate of a man, such expenses may be regarded as debts, nevertheless, appears to be settled in this state. The statute speaks of them as debts. They are classed under the same head as the allowance to the widow for a year's support. In the case of *Allen v. Allen*, 18 Ohio St. 234, where the question was directly made, the court sustained the action of the court below, where the allowance was treated as a debt, and held that "the allowance of a sum of money to the widow and child, under section 45 of the administration act, is classed among the *debts* of the deceased to be paid in the order specified in that section." If allowance for a year's support of widow is a debt it follows that funeral expenses are equally so. But, as before stated, the debt does not rest upon contract. The inability of a married woman to bind herself by contract generally, therefore, furnishes no reason why her estate should not be bound. If the statute applies to the estate of a married woman it is bound; if it does not it is not bound. In terms it does apply. The language is, "*every* executor and administrator shall pay," etc. Unless there is good reason founded upon prin-

ciple why the married woman's estate should be excepted, then no exception should be made. It is urged that such good reason is found in the fact that at common law there is a duty upon the husband to dispose of the body of his deceased wife by decent sepulture in a suitable place. This is conceded, and it is not intended here to weaken the force of that duty, nor to impair the liability of the husband for the expenses of such burial. But the husband may be without means and unable to procure the services of those whose business it is to bury the dead, though the wife leave an abundance. What shall be done in such case? Shall the body remain unburied? If in such circumstances it is proposed to resort to the wife's estate for such expenses, it must be upon some principle, some rule. What shall it be? We have seen that the law of contract does not aid. She can not, any more than could a deceased husband as to his funeral expenses, be presumed to have contracted. Plainly, then, it must be by the force of legislation. That we have, and if we apply it in any case to the estate of a deceased married woman, it is difficult to see why, upon principle, it should not be applied to all. If we undertake to make arbitrary exceptions and distinctions, then the rule fails, for if it can not rest upon the doctrine of a statutory debt, and charge upon the estate, it is not easy to find satisfactory foundation for it. Besides, if the application of the statute be limited to cases where the husband is insolvent, then we impose upon the one who spends time and money upon the conduct of the funeral the burden of first exhausting the liability of the husband by suit, or at least demonstrating his insolvency. A decent regard for the proprieties of the situation would seem not to require this.

We think the statute was based upon a well recognized necessity, and that such debts may be regarded as created by statute from necessity, and as a charge upon the estate, the same as the necessary expenses of administration, and the statute as furnishing the rule of liability. *Patterson v. Patterson*, 59 N. Y. 574. The burial of the dead is a matter

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of necessity. The public health requires that it be done, and a proper public sentiment equally requires that it be done decently. *Rex v. Stewart*, 12 Ad. & Ell. 773. "The estate in the hands of the executor is bound by law for the payment of the expenses of the decent interment of the dead." *Haggood v. Houghton*, 10 Pick. 154. The statute of Massachusetts is similar to that of Ohio, and the court is here speaking of the effect of the statute. It is clear that the expense should be required to be met by any estate which the deceased may leave. Is there any reason for saying that this most reasonable requirement should not apply where the deceased is a married woman? As before stated, we regard the liability as resting on the statute, and upon that wholly. This must have for its basis, in large measure at least, considerations of public policy arising in the necessity of the case. That the dead might have proper sepulture, a clear, easily understood provision as to recompense for the expense was required. That provision we find in the statute. The question, then, is, do not considerations of public policy apply as well to the case of a married woman as to a man? The necessity in the individual instance may or may not be as great, but where is the difference in principle?

Divers authorities are cited by counsel for defendant in error, but we find none presenting the precise question presented here as to the funeral expenses. *Sears v. Gildley*, 41 Mich. 590, is specially relied upon. In that case the surviving husband, with the son of a deceased wife by a former marriage, went together to the undertaker's and there ordered the casket and other goods for the funeral. Nothing was said about payment, or who was to be charged. The charge, however, was made to the husband, and the credit apparently given to him. The action was by the undertaker against the husband on the account. He sought to defend, on the ground that the wife had property which she had willed to the son, and therefore he should pay. The court held, and we have no doubt rightly, that the husband must pay. In deciding the case, Cooley, J., uses this significant

language: "A funeral can not be delayed for judicial inquiries to determine upon whom the moral obligation to proceed with it rests most heavily." In other words the undertaker may conduct the funeral decently and in order, and look to such person as ought to pay for his recompense. In that case it was the husband. In *Gunn v. Samuel*, 33 Ala. 201, an insolvent husband called in the plaintiff, a doctor, to attend his sick wife, her children and slaves. The wife was not consulted and gave no order. During her last illness she requested that a slave be sold to pay the doctor's account. The court held that it being the legal as well as moral duty of the husband to furnish medical attendance for his sick wife, a legal liability rests on him to pay, and her request did not impose an original liability or make her estate responsible, though if she had made a contract originally, express or implied, to pay the doctor, he would be entitled to recover. *Smyley v. Reese*, 53 Ala. 89, is, perhaps, a stronger authority for defendant in error. In that case the husband, as administrator of his deceased wife, paid the expenses of her funeral from the assets of the estate and asked to have the amount allowed in settling his accounts, which was refused, the court holding that the statutes of that state "creating the wife's statutory estate do not absolve the husband from his common-law obligation to furnish suitable sepulture for his wife," and that the administrator, in paying the funeral expenses, was but paying his own debt. The question of payment by an executor, not the husband, who had ordered the expenses, is not in that case. A holding contrary to the doctrine of the last case was made in *Gregory v. Lockyer*, 6 Maddock, 90, where the husband having paid the funeral expenses of the wife, and made a claim before the master to have them repaid by the executor from the separate estate of the wife, the separate estate was by decree ordered to be applied in payment.

The question is not simply whether the husband is liable as between him and the undertaker, but may not the estate of the wife also be liable, and may not the executor, having

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ordered the expense, be justified in paying the claim from that estate? If not, then a woman may die leaving thousands in lands, money, and bonds, and if she happen to leave a husband, and he insolvent, the body may lay uncared for until some charitable friend comes to the rescue, or it be taken care of and buried by the town. Public decency and a just regard for an enlightened sentiment forbids.

True, the wife's property may not be taken for the husband's debt. But if the debt may be treated, as we think in this case it may be, as well that of the wife as of the husband, it would not seem inequitable to allow her estate to bear the burden, though that does serve to exonerate him. At common law the husband and wife were one, and that one was the husband. Not so now. The common-law right in and power over the wife's property by the husband is almost entirely taken away by our legislation. All estates and property, including rights in action belonging to her at marriage, or which come afterward by conveyance, gift, devise, or purchase with her separate money or means or due as wages of her personal labor, or growing out of the violation of her personal rights, together with rents, incomes, issues, and profits, are her separate property. As to the real estate she may rent it for three years, and by will dispose of it entirely at her decease, and the personal estate she may control and dispose of absolutely without the husband's consent. And as to all this separate property she may sue and be sued as if she were unmarried. He has no control whatever over the personal property, except it be reduced to his possession with the *express assent* of the wife, and mere care, occupancy, and use is not to be deemed a reduction to possession unless by the terms of the express assent full authority is given him to dispose of it for his own use. Curtesy initiate, as it existed at common law, is now held not to exist in Ohio, and the right of curtesy is conferred only on surviving husbands in estates of which the wives die seized. It appears plain by this that the relations of the husband and wife as to property have greatly changed in this state by statute, and that much of

the reason for the rule that the husband's liability should be held to be so exclusive as to make impossible the subjecting of the wife's separate estate to payment of expenses resulting from her necessities has vanished with the change. If the reason for the rule is in large measure gone because of these statutes, we may with some willingness be ready to see the rule, by virtue of other statutes, in equal measure, disappear.

As to the physicians' bills for attendance during last sickness, the record shows that they were incurred by direct procurement of the deceased. That they were for her benefit admits of no doubt. She had the power to make the same a charge upon her separate estate. And while there are many reasons for saying that such expenses are made by the statute debts against and charges upon the estate of the deceased, in like manner as funeral expenses are, there is the additional consideration that the charge is also made by the deceased herself.

We expressly disclaim any purpose of deciding what is not before us. We hold that, under the circumstances, the executor had the right to follow the statute; to pay the physicians' bills and the funeral expenses from the estate of the testatrix, and having paid them has now the right to be allowed for such payments.

No question is made here as to the tombstone. The court of common pleas approved of that item and ordered it paid. The district court affirmed the judgment as to that, and there the matter was allowed to rest. Regarding the items of taxes, we find sufficient ground in the record to warrant a reversal of the finding and judgment of the court of common pleas by the district court irrespective of the question of the statute of limitations, and we express no opinion upon the question raised by the exceptions based upon the statute. The district court affirmed the judgment below as to all the items of taxes except the first twelve, and no one asks a reversal of that action.

It follows that the judgment of the court of common pleas sustaining the exceptions to the charges for funeral

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expenses and of last sickness, represented by vouchers, one three, four, five, and six, and of the district court affirming such judgment, will be reversed, and the judgment of the district court as to the items of taxes represented by voucher number ten, in part reversing the judgment of the common pleas and in part affirming the same, is affirmed. The probate court will be directed to allow to said executor in his settlement the items represented by vouchers one, three, four, five, six, seven, and all items of taxes except the first twelve. The costs of this proceeding in error are adjudged against both parties in equal proportions.

PAYNE v. THOMPSON.

Husband and wife—Partnership.

Prior to the legislation of 1884 (81 Ohio L. 65, 209), a married woman did not possess legal capacity to enter into a copartnership with her husband. (The effect of such legislation upon the legal capacity of married women is not involved in this case and not considered by the court.)

ERROR to the Court of Common-Pleas of Cuyahoga county, reserved in the District Court.

The plaintiffs, Payne, Newton & Co., filed in the court of common pleas their petition of the following tenor:

"Petition for Money and Equitable Relief, filed May 22, 1882. The plaintiffs, N. P. Payne and Isaac Newton, as partners, doing business under the firm name and style of Payne, Newton & Co., by Mix, Noble and White, their attorneys, complain of the defendants, M. T. Thompson and Elizabeth J. Thompson, partners, doing business under the firm name and style of M. T. Thompson & Co., for that:

"Plaintiffs are and at all the times hereinafter mentioned were partners, doing business under the firm name and style of Payne, Newton & Co. Defendants are and at all

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the times hereinafter mentioned were partners, doing business under the firm name and style of M. T. Thompson & Co. At all the times hereinafter mentioned said defendant, Elizabeth J. Thompson, was, and she is now a married woman, wife of said defendant, M. T. Thompson, and was and is the owner of a large estate of real and personal property and choses in action of great value; but the value and description thereof plaintiffs are unable to state more particularly than is hereinafter done, which is under her sole control and exclusive management, and which she owns in fee-simple in her own right, and as her own separate property, from which she receives for her own separate use a large income; but the amount thereof plaintiff is unable to state. Said real estate belonging to said defendant, Elizabeth J. Thompson, is bounded and described as follows: ”

(Here follow descriptions of several tracts of land situated in Cuyahoga county.)

“The husband of said Elizabeth J. Thompson had not at any of said times, nor has he any property of any kind subject to levy and sale on execution or otherwise for the payment of debts, and at all said times he did and he does acquiesce in and consent to the acts of management, control and disposition of her said separate property by said Elizabeth J. Thompson. The coal in this petition mentioned was all purchased by said firm of M. T. Thompson & Co., for use in its said business, in the course of its said business, which was that of selling coal by retail, in which business said defendant, Elizabeth J. Thompson, had invested a considerable part of her said separate estate, as her separate property, her interest therein and in the profits and losses thereof remaining her separate estate with the knowledge and consent of her husband. At the times of each of the purchases of said coal it was agreed and understood by and between each of the sellers thereof and said defendants, and especially said Elizabeth J. Thompson, that the same was sold upon the credit of her separate property, and that she intended to and did charge her separate estate and income with the payment therefor, and said vend-

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ors and each of them sold said coal to said firm of M. T. Thompson & Co., upon the faith and credit of the said Elizabeth J. Thompson, and of her said separate estate and income and of the said charge and lien thereon, and not otherwise.

"At all the times hereinafter mentioned the Lake View Coal Company was a corporation duly incorporated and existing under and by virtue of the laws of the state of Ohio. At the several times mentioned in the account hereto attached, marked A, and made part hereof, at request of defendants, said Lake View Coal Company sold and delivered to defendants the coal mentioned in said account at and for the agreed prices therein stated. Said Lake View Coal Company had sold and assigned said account to these plaintiffs as such partners as aforesaid, who are now the owners thereof. Nothing has been paid on said account, and there is now due and payable thereon from defendants to plaintiffs as such partners as aforesaid the sum of two hundred and sixteen dollars and eighty-eight cents (\$216.88), with interest thereon from the 25th day of March, A. D. 1882."

Here follow two other supposed causes of action, substantially like the first, each predicated upon an account assigned to plaintiffs by a party who had sold coal to the defendants.

The petition concludes with the following prayer:

"Therefore, plaintiffs as such partners as aforesaid pray judgment against said defendants for the sum of four hundred and eighty (\$480.13) dollars and thirteen cents, with interest on three hundred and eighty-nine (\$389.80) dollars and eighty cents from the 25th day of March, A. D. 1882, and on ninety (\$90.33) dollars and thirty-three cents from the 31st day of March, A. D. 1882; that said sum and interest may be declared a lien on said real estate; that said real estate may be subjected to the payment thereof, and for such other and further relief as equity and good conscience and the circumstances of the case may require."

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The copies of the accounts attached as exhibits to the petition are in the following form :

"M. T. THOMPSON & Co., bought of LAKE VIEW COAL CO.

1882. March 3. Car 629, 15,100 tons coal.

" " 3. " 864, 14,800 " " etc., etc."

Elizabeth J. Thompson demurred to this petition. The demurrer was sustained and judgment rendered for her.

Judgment was rendered against M. T. Thompson upon the accounts for the amount claimed.

To reverse the judgment in favor of Elizabeth error was prosecuted in the district court, wherein the cause was reserved to this court.

Mix, Noble & White, for plaintiffs in error.

A married woman may embark her separate estate in trade, either alone or in conjunction with other persons, and such estate may be charged in equity with the satisfaction of engagements entered into in the course of such joint trade, either by herself or her associates. Such association may be made either with her husband or a third person.

Was it intended that the separate estate should, if it became necessary, respond to or secure the contract obligation? Such intention may be express or implied. *Phillips v. Graves*, 20 Ohio St. 371; *Avery v. Vansickle*, 35 Ohio St. 270; *Williams v. Urmston*, 35 Ohio St. 296; 3 Pom. Eq. Jur. 47, n. 1, 52, n. 1; *Stew. Hus. and Wife*, §§ 206-7.

A married woman has, in equity, in relation to her separate estate, the same powers and liabilities as a *feme sole*. *Stew. Hus. and Wife*, § 203; *Buckley v. Wells*, 33 N. Y. 518, 523; *Pybus v. Smith*, 3 Bro. Ch. 840*, 846*; *Towers v. Hagner*, 3 Whart. (Pa.) 48, 57; *Gardner v. Gardner*, 22 Wend. 526, 528; *North Am. Coal Co. v. Dyett*, 7 Paige, 9; s. c., 20 Wend. 570, 573; *Jaques v. Meth. Epis. Ch.*, 17 Johns. 548, 578; *Taylor v. Meads*, 34 L. J. (N. S.) 203, 207; 1 Bish. Law Mar. Wom., §§ 552, 557, 861, 861; 2 Story Eq. Jur. § 1397; 3 Pom. Eq. Jur., §§ 159, 1104; *Schouler Hus. and*

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Wife, §§ 241-3, 246; 2 Perry Trusts, §§ 654-5; *Williams v. Urmston*, *supra*.

The weight of authority is that a wife has in equity all powers as to her separate estate not expressly taken away by the act (we add "or statute") of settlement. 3 Pom. Eq. Jur., pp. 28, 29, n. 2, p. 53, n. 3; Schouler Hus. and Wife, § 239; *Jaques v. Meth. Epis. Ch.*, *supra*; Kelley Con. 259, n. 5.

In dealing with her property she has, in equity, all the powers incident to ownership, of which the chief is the *jus disponendi*. *Phillips v. Graves*, 20 Ohio St. 371; 1 Bish. Mar. Wom., §§ 552, 553, 857, 861-864.

The notion that only the written contracts of a married woman are enforceable in equity we believe to be exploded in Ohio. *Phillips v. Graves*, *supra*; *Williams v. Urmston*, *supra*; *Avery v. Vansickle*, *supra*. See Perry Trusts, § 358 n. 3.

The petitions specifically aver that the contracts were made, on both sides, on the credit of a charge created on the separate estate. These actions can be maintained if the proof shows that Mrs. Thompson invested her separate estate in the coal business, as her property, with the idea thereby of increasing the estate, or of saving the estate from the burden of supporting the family, or to add to her luxuries, or to make the estate fruitful, and knew that to accomplish this result purchases on credit would be necessary, and empowered her husband to make them; and that these purchases were made for that business and purpose, under that power; and that the vendors, when making the sales, knew the husband was insolvent and the wife wealthy; were so told by the husband; and sold on the credit of the wife's property, trusting it and her. This, whether we do or do not succeed in showing that she personally took part in the business, and that she knew of and directed these specific purchases. To sustain the propositions maintained under this head, we refer to the following authorities: *Butler v. Cumpston*, L. R., 7 Eq. 16, 20, 21; *Matthewman's case*, L. R. 3 Eq. 781, 787; 1 Bish. Mar. Wom., §§

857-8, 861-2, 876; Schouler Hus. and Wife, §§ 241-2, 246; Wells' Sep. Prop. Mar. Wom., §§ 448, 452, 453, 465; *Todd v. Lee*, 15 Wis. 380; *Phillips v. Graves*, *supra*; 2 Story Eq. Jur., § 1400; Stew. Hus. and Wife, § 206.

It is certainly not true that a married woman can not carry on trade. This is clearly settled in Ohio. *Morgan v. Perhamus*, 36 Ohio St. 517.

A married woman may, at least with her husband's consent, embark her separate estate in trade, and in equity charge her separate estate with engagements incurred in business. Stew. Hus. and Wife, §§ 46, 203; Schouler Hus. and Wife, §§ 299-304, 310; 2 Story Eq. Jur., §§ 1385-1387; 24 Am. L. Reg. (N. S.) 358; *Haight v. McVeagh*, 69 Ill. 624, 625; *Martin v. Robson*, 65 Ill. 129; *Nispel v. Laparle*, 74 Ill. 306, 308; *Wilson v. Loomis*, 55 Ill. 352; *Blood v. Burnes*, 79 Ill. 439; 3 Pom. Eq. Jur., § 1105, n. 1.

Having the power to engage her separate estate in trade, she may employ agents whose acts will bind such estate, Stew. Hus. and Wife, 364; Whart. Ag., § 11; *North Am. Coal Co. v. Dyett*, 7 Paige, 9, 14. See L. R. 10 Q. B. 147; *Allen v. Johnson*, 48 Miss. 413.

Wherever it is held that a married woman may engage her separate estate in trade, it is held she may do this alone or in conjunction with others, personally, through agents, or as a partner. Pars. Part. 25 and n. 2; Collyer Part., § 14, n. 4; *Atwood v. Meredith*, 37 Miss. 635; *Newman v. Morris*, 52 Miss. 402; *Bitter v. Rathman*, 61 N. Y. 512; *Scott v. Conway*, 58 N. Y. 619; Kelley Con. Mar. Wom. 159; *Haight v. McVeagh*, *supra*; Stew. Hus. and Wife, § 480; 2 Bish. Law. Mar. Wom., § 436; *Penn v. Whitehead*, 17 Gratt. 503, 512; *Parshall v. Fisher*, 43 Mich. 529, 534; *Preusser v. Henshaw*, 49 Iowa, 41, 44; *Silveus v. Porter*, 74 Pa. St. 448, 449.

The relations of husband and wife are not inconsistent with those of partner to partner.

It is true that at common law husband and wife constitute but one person and that the husband could not deal with the wife's personal property without reducing it to his possession and thus becoming himself the owner. But

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this was not true in equity as to the wife's separate estate.

In Ohio there is no such thing as a wife's *general* estate. All her property seems to have become her separate estate. *Phillips v. Graves, supra.*

In equity husband and wife, as to the wife's separate estate, are distinct persons. They may sue, contract with, and become debtor and creditor of each other. 2 Story Eq. Jur., §§ 1168, 1370, 1372; Stew. Hus. and Wife, §§ 42, 45, 46; Willard Eq. Jur. 634, 646, 649; *Wilcox v. Todd*, 64 Mo. 388; *Wright v. Wright*, 16 Iowa, 496; *Northrop v. Barnum*, 15 Wend. 167; *Head v. Head*, 3 Atk. 295; *Guth v. Guth*, 3 Bro. Ch. 614; *Angier v. Angier*, Finch Prec. 497; *Jelineau v. Jelineau*, 2 Desaus. Ch. 50; *Prather v. Prather*, 4 Desaus. Ch. 35; Reeves Dom. Rel. 214; 2 Story Eq. Jur., § 1380; *Strong v. Skinner*, 4 Barb. 546; *Firemen's Ins. Co. v. Bay*, 4 Barb. 407, 414.

The wife may sue the husband to compel specific performance of agreements made between them without the intervention of trustees before or after marriage. *Garlick v. Strong*, 3 Paige, 440, 451; *Cannel v. Buckle*, 2 P. Wms. 243, 244; *Sidney v. Sidney*, 3 P. Wms. 269; *Wright v. Cadogan*, 2 Eden Ch. 253; *Cruger v. Cruger*, 5 Barb. 231; *Bradish v. Gibbs*, 3 John. Ch. 523; *Livingston v. Livingston*, 2 John. Ch. 537.

Or to restrain the husband from interfering with her separate estate, and to get control of it. *Martin v. Martin*, 1 N. Y. 473; 1 Hoffm. Ch. 462; *Minier v. Minier*, 4 Lans. 421, 422; *Whitney v. Whitney*, 49 Barb. 319, 322; s. c., 3 Abb. Pr. 350, 353.

Or to set aside conveyance of wife to husband. *Fry v. Fry*, 7 Paige Ch. 461, 463.

Or to obtain an equitable allowance out of that part of her husband's estate derived through the wife. *Carter v. Carter*, 1 Paige Ch. 463; *Partridge v. Havens*, 10 Paige, 625; *Van Dazer v. Van Dazer*, 6 Paige, 366; Clancy Mar. Wom. 464; 2 Story Eq. Jur. §§ 1404, 1414; *Roberts v. Roberts*, 2 Eq. Cas. 421; *Kenny v. Udall*, 5 John. Ch. 463; s. c., 3 Cow. 590.

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A wife may purchase property from her husband for a *bona fide* and valuable consideration. *Livingston v. Livingston*, 2 John. Ch. 537; *Lady Arundel v. Phipps*, 10 Ves. 139, 146, 149; *Savage v. O'Neil*, 44 N. Y. 298.

A wife may purchase a judgment against her husband, levy on his land and sell it to pay the same. *Strong v. Skinner*, 4 Barb. 546.*

By marriage settlements a wife may act as to her separate estate as a *feme sole*, may loan to her husband if she choose, and he must repay her as though he were a stranger. *Towers v. Hagner*, 3 Whart. (Pa.) 48, 57; *Pybus v. Smith*, 3 Bro. Ch. 340*, 346*; *Schaffner v. Reuter*, 37 Barb. 44, 49; *McCartney v. Welch*, 44 Barb. 271; *Woodworth v. Sweet*, 44 Barb. 268, 271; *Babcock v. Eckler*, 24 N. Y. 623; *Savage v. O'Neil*, 44 N. Y. 298, 301, 302; *Grabill v. Moyer*, 45 Pa. St. 530; *Rowland v. Plummer*, 50 Ala. 193; *Bryan v. King*, 51 Ga. 291; *Hurlbut v. Wade*, 40 Ohio St. 603; *Huston v. Cone*, 24 Ohio St. 11; *Huber v. Huber*, 10 Ohio, 371.

A wife may, in equity, sue a firm of which her husband is a member, for money loaned. *Gould v. Gould*, 36 N. J. Eq. 380; *Devin v. Devin*, 17 How. Pr. 514; *Young v. Ross*, 3 W. L. G. 349.

For a fair consideration there may be contracts between husband and wife, and these are enforceable in equity. *Wal-lingsford v. Allen*, 10 Pot. 583, 594; 2 Story Eq. Jur., §§ 1372, 1374, 1385-7; *Steadman v. Wilbur*, 7 R. I. 481, 485, 486.

Husband may be wife's tenant. *Albin v. Lord*, 39 N. H. 196; *Booker v. Worrill*, 55 Ga. 332; *Kaufman v. Whitney*, 50 Miss. 103.

Husband may sue in equity to change wife's separate estate with money borrowed from him. *Gardner v. Gardner*, 7 Paige, 112; s. c., 22 Wend. 526, 528; *Myers v. King*, 42 Md. 66; 67 Mo. 596.

Husband may be agent of wife. *Fairbanks v. Mothersell*, 60 Barb. 406, 407.

Wife may foreclose mortgage against husband given

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before marriage. *Power v. Lester*, 17 How. Pr. 413; s. c., 23 N. Y. 527.

Husband may assign directly to his wife a claim in his favor for his work and labor. *Seymour v. Fellows*, 77 N. Y. 178, 179.

Wife may carry on business and have her husband manage it for her. *Schouler Hus. and Wife*, §§ 277, 282, 314, 315; *Owen v. Cawley*, 36 N. Y. 600, 604; *Draper v. Stouvenal*, 35 N. Y. 513; *Buckley v. Wells*, 33 N. Y. 518, 521, 523; *Smith v. Sweeny*, 35 N. Y. 291, 294; *Freiberg v. Branigan*, 18 Hun, 344; *Merchant v. Bunnell*, 3 Keyes, 541; *Knapp v. Smith*, 27 N. Y. 277, 280; *Kluender v. Lynch*, 4 Keyes, 361; *Abbey v. Deyo*, 44 Barb. 374; s. c., 44 N. Y. 343; *Whedon v. Champlin*, 59 Barb. 61; *Lockwood v. Cullin*, 4 Robt. 136; *Wells v. Smith*, 54 Ga. 262; *Glover v. Alcott*, 11 Mich. 492; *Cooper v. Ham*, 49 Ind. 394; *Manderbach v. Mock*, 29 Pa. St. 46; *Jones v. Smith*, 121 Mass. 15; 2 Bish. Law Mar. Wom., § 439; *Bellows v. Rosenthal*, 31 Ind. 116; *Rankin v. West*, 25 Mich. 195, 200; *Porter v. Mount*, 45 Barb. 422; *Warner v. Warren*, 46 N. Y. 228; *Baum v. Mullen*, 47 N. Y. 577, 579; *Bodine v. Killeen*, 53 N. Y. 93.

The doctrine of non-identity has been recognized by this court. *Crooks v. Crooks*, 34 Ohio St. 610. See also *Hardy v. VanHarlingen*, 7 Ohio St. 208; *Huber v. Huber*, 10 Ohio, 371; *Huston v. Cone*, 24 Ohio St. 11; *Fowler v. Trebein*, 16 Ohio St. 493.

Husband and wife may be jointly liable. *Williams v. Urmston*, 35 Ohio St. 296. See also *White v. McNett*, 33 N. Y. 371; *Heatley v. Thomas*, 15 Ves. 596; *Hulme v. Tenant*, 1 Brown Ch. 16; *Standford v. Marshall*, 2 Atk. 69; *McKenna v. Rowlett*, 68 Ala. 186.

The following are some of the cases usually cited as being against our claim: *Carey v. Burruss*, 20 W. Va. 571; s. c., 43 Am. Rep. 790; *Meyer v. Soyster*, 30 Md. 403; *Bradstreet v. Baer*, 41 Md. 19; *Plumer v. Lord*, 5 Allen, 460; s. c., 7 Allen, 481; s. c., 9 Allen, 455; *Lord v. Parker*, 3 Allen, 127; *Edwards v. Stevens*, 3 Allen, 315.

Since the decisions of the Massachusetts courts, however,

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it has been said by an eminent jurist that they are really based on the want of equity jurisdiction in the courts deciding them. *In re Blandin*, 1 Low. 543.

The same opinion has been intimated by the Massachusetts supreme court. *Atlantic Nat. Bank v. Tavenor*, 130 Mass. 407, 409; *Bassett v. Bassett*, 112 Mass. 99; 3 Pom. Eq. Jur., § 1126, n. 1.

So in the following cases it was held, for reasons good only at law, that a married woman could not be a partner in trade: *Montgomery v. Sprankle*, 31 Ind. 113; *Hass v. Shaw*, 91 Ind. 384; 44 Tex. 381. But see *Morgan v. Perhamus*, 36 Ohio St. 517.

A married woman may be a partner with her husband. *In re Goodman*, 5 Biss. 401; *In re Kinkead*, 3 Biss. 405; *Todd v. Lee*, 15 Wis. 365; *Krouskop v. Shontz*, 51 Wis. 204; *Zimmerman v. Erhard*, 58 How. Pr. 11; s. c., 8 Daly, 311; s. c., 83 N. Y. 74; *Graff v. Kinney*, 15 Abb. N. C. 397; *Tibbatts v. Tibbatts*, 6 McLean, 80; *Scott v. Conway*, 58 N. Y. 619.

Text writers have differed very widely as to the real meaning of the decision of *Swasey v. Antram*, 24 Ohio St. 87, relied upon by counsel for defendants in error. *Kelley Con. Mar. Wom.* 159; *Schouler Hus. and Wife*, § 317; *Wells' Sep. Prop. Mar. Wom.*, § 155.

W. C. Rogers, for defendants in error.

The plaintiffs call on the court to set aside a long and well established rule of property, to reverse at least two, if not three, decisions of this court, and go a long step further than the legislature has yet gone. They desire the court, as we understand it, to distinctly overrule *Quigley v. Graham*, 18 Ohio St. 42; *Swasey v. Antram*, 24 Ohio St. 87; *Alexander v. Morgan*, 31 Ohio St. 551.

At common law a married woman could not be a partner with her husband. 1 Black Com. 442; 2 Com. Dig., Baron & Feme, D. 1; *Scarborough v. Watkins*, 9 B. Mon. 545; *Stew. Hus. and Wife*, §§ 41, 358; *Bertles v. Nunan*, 92 N. Y. 160; *Robins v. McClure*, 3 N. E. Rep. 666; Proffatt

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Wom. Before the Law, 33, 53, 55, 56; *Ramsdall v. Craig-hill*, 9 Ohio, 197; *Walden v. Chambers*, 7 Ohio St. 30; *Needles v. Needles*, 7 Ohio St. 432.

The wife can make such contracts only as positive statutory enactments allow. *Bertles v. Nunan*, *supra*; *Coleman v. Burr*, 93 N. Y. 17; *Pollen v. James*, 45 Miss. 129, 133; *Hinkson v. Williams*, 41 N. J. Law, 35; *Nash v. Mitchell*, 71 N. Y. 199; *Stillwell v. Adams*, 29 Ark. 346; 11 Allen, 214; *West v. Laraway*, 28 Mich. 464; *Lewis v. Perkins*, 36 N. J. Law, 133; *Scarborough v. Watkins*, 50 Am. Dec. 528; *Levi v. Earl*, 30 Ohio St. 163; *Crooks v. Crooks*, 34 Ohio St. 614; *Alexander v. Morgan*, 31 Ohio St. 549; *Fowler v. Chichester*, 26 Ohio St. 9; *Wilson v. Wilson*, 30 Ohio St. 365.

The legislation relating to married women can not receive a liberal construction. *Cole v. Van Ripcr*, 44 Ill. 64; *Ashley v. Rockwell*, 43 Ohio St. 386.

When a statute authorizes her to contract with reference to her separate property, her contracts, to be valid, must be with reference to her separate property. The extent of the power depends upon the grant. *Samnis v. McLaughlin*, 35 N. Y. 647; *Jenz v. Gugel*, 26 Ohio St. 527; *Allison v. Porter*, 29 Ohio St. 136; *Avery v. Vansickle*, 35 Ohio St. 273; *Libby v. Berry*, 84 Me. 288; *Machir v. Burroughs*, 14 Ohio St. 519.

At common law the marriage of the *feme sole* dissolved the partnership. 1 Lindley on Part. 240*, 241*; Pars. Part. 390, 462; *Bassett v. Shepardson*, 52 Mich. 3; *Brown v. Chancellor*, 61 Tex., 437, 445; *Alexander v. Morgan*, 31 Ohio St. 551.

The point here involved does not need to be argued out from inferences and fanciful conclusions. It has been squarely met and decided again and again, and in numerous states having a code like ours. *Brown v. Jewett*, 18 N. H. 230; *Bassett v. Shepardson*, *supra*; *Plumer v. Lord*, 7 Allen, 481; *Whitney v. Closson*, 138 Mass. 49; *Haas v. Shaw*, 91 Ind. 384, 389; *Brown v. Chancellor*, 61 Tex. 437; Story Part. 306; 1 Collier Part. 151; *Bradstreet v. Baer*, 41

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Md. 19; *Carey v. Burruss*, 20 W. Wa. 571; *Kaufman v. Schoeffel*, 37 Hun, 140. See also *Shartzer v. Love*, 40 Cal. 98; *Montgomery v. Sprankle*, 31 Ind. 113; *Lord v. Parker*, 8 Allen, 127; *Plumer v. Lord*, 5 Allen, 460; *Chatterton v. Young*, 2 Tenn. Ch. 768, 772; *Atlantic Nat. Bank v. Taverner*, 130 Mass. 409; *Fairlee v. Bloomingdale*, 14 Abb. N. C. 341; *Bertles v. Nunan*, 92 N. Y. 152; *Coleman v. Burr*, 93 N. Y. 17; *Snyder v. People*, 26 Mich. 106; *Smiley v. Smiley*, 18 Ohio St. 543; *Howard v. Stephens*, 52 Miss. 239; *Quigley v. Graham*, 18 Ohio St. 42; *Swasey v. Antram*, *supra*; *Ex parte Holland*, L. R. 9 Ch. App. Cas. 307; *Story Part.*, sec. 10; 1 *Collier, Part.*, § 14; *Stew. Hus. and Wife*, § 40; 1 *Lindley Part.* 84; *Proffat Wom. Before the Law*, 53; *Wells Sep. Prop. Mar. Wom.*, § 155; 19 *Am. L. Rev.* 371; 6 *South. L. Rev. N. S.* 657.

OWEN, C. J.

1. Do the facts stated in the plaintiffs' petition entitle them to the relief they seek against the defendant, Elizabeth J. Thompson, which is, that the sums represented by the accounts which they aver were sold and assigned to them, may be declared a lien upon her separate real estate, and that the same may be subjected to the payment thereof?

This is the sole question presented for our consideration. These accounts against the supposed partnership, composed of M. T. Thompson and his wife (as M. T. Thompson & Co.), which the plaintiffs say accrued to their assignors by reason of the sale of coal by the latter to such firm, are made the basis of their proceeding to subject the separate real estate of Elizabeth to their payment. They are the only evidences of indebtedness, or of the supposed causes of action which the plaintiffs in form allege were assigned to them by the parties in whose favor, it is alleged, they were contracted.

If they are entitled to the relief they seek, it is because such remedy is incidental to the liability represented by these accounts.

This involves the presupposition that M. T. Thompson

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and his wife, Elizabeth, had capacity to, and did, enter into a trading partnership for the purpose of buying coal and selling the same at retail. We are not materially aided in our investigation by the fact that the broad and comprehensive averments of the petition were evidently inspired by a determination to impart to the proceeding, at all hazards, an equitable character.

It is averred that, in the business of the firm of M. T. Thompson & Co., Elizabeth "had invested a considerable part of her said separate estate, as her separate property, her interest therein, and in the profits and losses thereof remaining her separate estate with the knowledge of and consent of her said husband."

In spite of the heroic averment that not only the profits of the business but even the *the losses thereof remained her separate estate*, we are confronted at the threshold of our inquiry with the requirement that, as an indispensable predicate to an equitable charge upon her separate estate, Elizabeth Thompson and her husband must have entered into a trading partnership. It was in the business of such a firm, if at all, that she embarked her separate property. It was as collateral to the liability of such a firm, if at all, that she charged her separate estate in equity. A partnership is an association for the purpose of prosecuting any lawful business, formed by contract between two or more persons.

A contract, it seems, is essential to the formation of a partnership. Among the essentials of every contract are two competent contracting parties, and mutuality of obligation.

That a married woman had not capacity at common law to enter into a partnership with her husband will not admit of serious controversy. 1 Black. Com. 442; Matthews Part., § 9; 1 Collyer Part. (6th ed.), sec. 14; *Brown v. Jewett*, 18 N. H. 230; Parsons Part. *23.

If she be endowed with capacity to enter into a contract of copartnership with her husband in Ohio, it is so by favor of some enabling statute. Except so far as capacity

has been given to her by statute to bind herself by her contracts they are void. We are not now dealing with her power to charge her separate property in equity, but simply with her power to bind herself at law by her contracts. As the transactions involved in this controversy occurred prior to the legislation of 1884 (81 Ohio L. 65, 209), we are not called upon to consider or construe these enactments.

Without reviewing the legislation of this state, the object and effect of which has been to remove some of the common-law disabilities of married women and to invest them with capacity to bind themselves in certain respects by their contracts, it is sufficient to say that, at the time of the transaction involved in this inquiry, no power had been given them by statute to engage in business, as partners, with their husbands. See *Levi v. Earl*, 30 Ohio St. 167.

While this court has not heretofore been called upon to consider this precise question, the manifest tendency of its adjudications has been in the direction of the conclusion just announced. *Swasey v. Antram*, 24 Ohio St. 87; *Alexander v. Morgan*, 31 Ohio St. 551. In the latter case it was said that when an unmarried female was engaged in business as a partner, her marriage dissolved the partnership of which she was a member. This proposition is vitally inconsistent with the theory that a married woman has capacity to engage in business as a partner.

In *McClelland v. Bishop*, 42 Ohio St. 113, it was held that the joint note of the husband and wife is the valid obligation of the husband alone.

It should be borne in mind that the provisions of sections 4496 and 5319 of the Revised Statutes were not intended to enlarge or vary the liabilities of married women, but relate merely to the form of remedy. *Jenz v. Gugel*, 26 Ohio St. 527; *Allison v. Porter*, 29 Ohio St. 136.

2. Counsel for plaintiffs in error invite us, however, to look upon the proceeding below and the transactions which it involves, as relating wholly to Elizabeth's power to charge her separate property in equity. They say: "It

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may be well to define what we mean when we claim that a married woman may be a partner. It is not contended that she is a partner in the same sense in which a man is a partner. A person *sui juris*, who is a partner, thereby makes him or herself *personally* liable *at law* for all engagements contracted in the partnership business by any of the partners. This we do *not* claim to be true as to a married woman, but we do claim that a married woman may embark her separate estate in trade; that this trade may be carried on alone, or in conjunction with other persons, and that her separate estate may be charged in equity with the satisfaction of engagements entered into in the course of such joint trade, either by herself or her associates. We further claim that she may thus associate herself in trade either with her husband or with third persons."

Looking to the petition, we fail to find a warrant for the peculiar interpretation of its averments here contended for. It is averred that the defendants were "partners doing business under the firm name and style of M. T. Thompson & Co." That the coal which entered into the accounts sued upon "was all purchased by said firm of M. T. Thompson & Co. for use in its said business in the course of said business, which was that of selling coal by retail." That their assignors "sold and delivered to defendants the coal mentioned in said account at and for the agreed prices therein stated." The accounts were made out as against "M. T. Thompson & Co." In this form they were sold and assigned to the plaintiffs. It is averred that nothing has been paid on these accounts, and that there is now due and payable *thereon* from the defendants to the plaintiffs the sums named in the accounts. The prayer is for judgment against defendants for the sums stated in the accounts, and that the same be declared a lien upon the real estate of the wife, which it is prayed may be subjected to their payment. The theory of counsel, as indicated above, almost wholly ignores the existence of the husband as a contracting party. It is averred that he had not nor has he any property of any kind subject to the payment of

debts. That the coal was sold upon the credit of the separate estate of the wife, and that she intended to and did charge her separate estate and income with the payment thereof. This theory of counsel also ignores or is utterly inconsistent with the existence of any such partnership as the petition describes.

With the partnership also disappears the accounts; and as they are the only evidences of indebtedness which the plaintiffs allege they purchased or hold, there would not seem to be much left upon which to predicate the proceeding to charge and subject the separate property of Elizabeth. We do not feel at liberty thus to emasculate the plaintiffs' petition by construction.

The existence of a partnership capable of contracting a liability represented by these accounts is vital to the relief which the plaintiffs seek against the estate of Elizabeth.

Giving to the petition that reasonable and liberal construction to which it is entitled, we find no difficulty in construing its object to be to subject the separate property of the wife to the satisfaction of the supposed liability of an alleged partnership of which she is treated as a member, and this by virtue of a charge which she is supposed to have imposed upon it in equity. As no such partnership had or could have a legal existence, and as no such liability was incurred, no cause of action against the wife is stated in the petition.

3. If it be conceded, however, that "M. T. Thompson & Co." constituted a partnership capable of contracting, there is another view upon which the relief sought against Elizabeth should be denied. It will be conceded that it is not by virtue of any contract obligation that her separate estate can be charged in equity.

It is because, under all the circumstances of the transaction, it would be inequitable to withhold her property from satisfaction of liabilities incurred on the faith of it, that equity will subject it.

While it is averred in the petition that the husband is without means to pay debts, it does not appear that

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the firm of "M. T. Thompson & Co." is either without ample means to discharge its indebtedness, or that it is not still in the successful prosecution of its business. It is averred in the petition that Elizabeth invested a considerable part of her separate property in the business of the firm.

Whether this is the property which is now sought to be subjected does not appear. It is very clear, however, that, assuming the legal existence of a partnership, this property so invested in the business of the firm was thereby placed under the control of the husband as a member and consequently an agent of the firm, with full power to appropriate it to the satisfaction of the partnership liabilities. For this purpose it is the primary fund. In the absence of some averment that this fund, which is shown to have once had an existence, is exhausted, or is inadequate to the payment of plaintiffs' claim, there is not shown that state of circumstances which would justify a court of equity in decreeing that the separate property of the wife be subjected to the payment of the partnership liabilities.

While in either view the petition fails to show sufficient grounds for the relief sought against the wife's property, we regard the former as the true ground, and upon it we rest the determination of the case.

Judgment of the court of common pleas affirmed.

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Constitutional law—Section 4715, Revised Statutes, void.

There is no provision in the statutes whereby the owner of material taken by a supervisor for the repair of a public highway, under section 4715 of the Revised Statutes, can have his compensation assessed by a jury as required by section 19 of the bill of rights, and it is therefore invalid; and the owner, resisting a supervisor entering upon his lands

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under the provisions of said section, is not guilty of resisting an officer under the provisions of section 6908 of the Revised Statutes.

ERROR to the District Court of Washington county.

Chamberlain & Hamilton, for plaintiff in error.

James Lawrence and *L. W. Ellenwood*, for defendant in error.

BY THE COURT. The plaintiff in error was indicted and convicted under section 6908 of the Revised Statutes upon the charge of resisting a supervisor of a road district while the latter was, under the provisions of section 4715, attempting to enter upon certain uncultivated lands of the accused, near a public highway, for the purpose of obtaining gravel to repair the same.

That resistance to a supervisor of roads while in the execution of his office is an offense within the provisions of section 6908 of the Revised Statutes, was decided in *Woodworth v. The State*, 26 Ohio St. 196.

The ground, however, upon which a reversal of the conviction of the accused is asked, is that the section of the Revised Statutes (4715) under which the supervisor claimed the right to enter upon his lands, makes no provision for the assessment of his compensation by a jury, as required by section 19 of the bill of rights, and is therefore void. This we think is the fact and that the accused must be discharged. It is true that under this section of the bill of rights, property may be taken for the repair of a public highway without first making compensation in damages, as in other cases; but this is the only difference; the owner is, after his property has been so taken, entitled to have his compensation assessed by a jury. *Lamb v. Lane*, 4 Ohio St. 167; and, as said in that case, the constitution does not in this regard execute itself.

We fail to find any provision in the statutes by which the

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owner of property taken under section 4715 of the Revised Statutes, can have his compensation assessed by a jury. It is not found in sections 4744 and 4745. These sections only provide a mode by which he may be paid such sum as may be allowed to him by the township trustees, and, where the amount exceeds the sum of \$25, by the latter in connection with the county commissioners. No appeal is given from the decision of the trustees or commissioners to a court in which the owner may have his compensation assessed by a jury. The provisions of section 896, Revised Statutes, giving an appeal from the commissioners, is not applicable to this case. Provision is made in sections 1483 and 1484 whereby material may, in conformity to the constitution, be condemned for the repair of roads; but no such condemnation had been made in this case.

Judgments reversed, and accused discharged.

44	210
45	151
44	210
50	95

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63	426

KEMPER v. CAMPBELL.

Deed intended as mortgage—Record—Sections 4133 and 4134 Revised Statutes.

A deed, absolute in form, intended, however, to secure the payment of money due from the maker to the grantee, and, upon the payment of which by a certain time, the grantees agreed to reconvey the property to the grantor, though in equity a mortgage, is not a legal one; and, to make it available as against creditors of the grantor, it need not be recorded under section 4133 of the Revised Statutes, providing for the registration of mortgages; it is sufficient for such purpose, if it be recorded within the time prescribed by section 4134 of the Revised Statutes, making provision for the registration of all other deeds and instruments of writing for the conveyance or incumbrance of lands in this state, other than as provided in the previous section, 4133.

ERROR to the District Court of Hamilton county.

The facts are stated in the opinion of the court.

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Willis M. Kemper, Thos. McDougall and C. W. Cowan, for plaintiff in error.

The conveyance to Campbell was in fact a mortgage. This court has long since settled that a deed, absolute on its face, if in fact a mortgage, is governed by the law as to the record of mortgages, and takes effect only from the time of its delivery to the recorder as against creditors. *Woodruff v. Robb*, 19 Ohio, 212.

And what will be considered a mortgage is equally well settled. Whatever form the conveyance may be made to assume, if given in fact as collateral security for the payment of money, it is a mortgage. *Perkins v. Dibble*, 10 Ohio, 434; *Wilson v. Giddings*, 28 Ohio St. 554; *Cotterell v. Long*, 20 Ohio, 464.

But it is claimed that the deed to Campbell *equitably* takes precedence over the deed of assignment by force of the decision of *Gill v. Pinney*, 12 Ohio St. 38. But in that case no lien existed at the time the mortgage was recorded. The creditors had simply the right to obtain a lien by proper proceedings for that purpose. Here the deed to the assignee, a *bona fide* lien, took effect from the time it was delivered to the probate court, four minutes before the filing of the mortgage for record.

This court held in *Bloom v. Noggle*, 4 Ohio St. 45, that an agreement for a mortgage could not be held to be a specific lien as against a deed to an assignee actually delivered to the probate court.

It has been the rule for years in Ohio that a subsequent judgment lien takes precedence over a prior unrecorded mortgage or one defectively executed. *Mayham v. Coombs*, 14 Ohio, 428.

A recorded mortgage, not under seal, does not take precedence over a general assignment for the benefit of creditors. *Erwin v. Shuey*, 8 Ohio St. 509.

Bloom v. Noggle has been approved and followed in *Hanes v. Tiffany*, 25 Ohio St. 549, and *Kilbourne v. Fay*, 29 Ohio St. 264, 278.

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Campbell, Bates & Bettman, for defendant in error.

This court has said at least three times that the Ohio rule, that an unrecorded mortgage is invalid as against later incumbrances, is sufficiently stringent, and is not to be carried further than the rule requires. *Gill v. Pinney*, 12 Ohio St. 38, 48; *Strang v. Beach*, 11 Ohio St. 283, 289; *Bloom v. Noggle*, 4 Ohio St. 45, 55.

The reason of the rule does not apply here. There is no race of diligence between creditors. An assignee for creditors is not a *bona fide* buyer. *Burr. Ass.*, §§ 391 *et seq.*; *Morgan v. Kinney*, 38 Ohio St. 610. And takes subject to unrecorded liens. *Morgan v. Kinney*, *supra*.

An express agreement of parties that one mortgage shall be subject to another will be enforced. *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 406. So with an oral agreement to the same effect. *Rigler v. Light*, 90 Pa. St. 235.

Simmonds assigned only the surplus coming to him after the satisfaction of Campbell's interest; a claim for more could only be made by a *bona fide* buyer; that is, one holding the legal title. *Elstner v. Fife*, 32 Ohio St. 358; *Woods v. Dille*, 11 Ohio, 455. For valuable consideration. *Morris v. Daniels*, 35 Ohio St. 406. And without notice; but here the assignee and the mortgagee are the same individual.

But the question has already been settled in *Gill v. Pinney*, 12 Ohio St. 38; and the analogy between an administrator and an assignee for creditors is, as was said in *Kilbourne v. Fay*, 29 Ohio St. 268, 280, so perfect as to be hardly distinguishable. And see *Haskell v. Bissell*, 11 Conn. 174.

In Pennsylvania, where the law as to the record of a mortgage was as strict as that of Ohio, and the statute provided that no mortgage should be a lien until left for record, it was held that an unrecorded mortgage was a lien against an assignee for creditors. *Mellon's App.*, 32 Pa. St. 121; *Wyckoff v. Remsen*, 11 Paige, 564.

MINSHALL, J. On March 7, 1881, G. T. Simmonds and wife executed and delivered to T. C. Campbell a deed, absolute

in form, of a house and lot in Cincinnati for the expressed consideration of \$18,000.

According to a written proposition, signed by Campbell, upon which the deed was made, the consideration consisted of his assumption of a mortgage on the premises to F. D. Lincoln, then amounting to \$12,530 and of an indebtedness of \$320, due Campbell's firm for fees; and the allowance of an indebtedness to Campbell of \$2,100, for money before loaned, and cash \$3,050. It also appeared from this writing that Campbell was to let Simmonds remain in the property for one year rent free, and if he did not then pay the money advanced he was to give up the premises, and if he did, Campbell was to reconvey them.

Afterward, on May 7, 1881, and before the above deed was recorded, Simmonds made an assignment to Campbell of all his property, real and personal, for the benefit of his creditors; and on the same day Campbell, through a messenger, caused the deed of assignment to be delivered to the probate court of the county, and the other to himself, to be delivered at the office of the recorder to be recorded; the former being delivered to the probate court four minutes before the latter was delivered at the office of the recorder.

The house and lot was sold by Campbell for the sum of \$18,275; the sale was confirmed by the court, and Campbell admitting that the deed to him was intended as a security for the money he had loaned and advanced to Simmonds, the general creditors claimed that he was not entitled to any priority over them upon distribution of the fund—the deed to him not having been recorded until after the assignment had been made and filed in the office of the probate court.

The matter was decided by the probate court in favor of Campbell, and the creditors appealed to the court of common pleas, where the matter was again decided in his favor. The latter court having made a finding of facts substantially as stated, its judgment was affirmed on error by the district court; and the creditors now prosecute this

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proceeding to reverse the several judgments so rendered against them.

It is claimed in argument by the defendant in error, that this case should be governed by the decision in *Gill v. Pinney*, 12 Ohio St. 38, where it was held that a mortgage filed for record after the death of the mortgagor secured a lien to the mortgagee against the general creditors of the estate. If that case is right in principle, it is difficult to perceive why it should not apply to a case where a duly executed mortgage is not filed for record until after an assignment has been made by the mortgagor. A different view seems, however, to have been taken in the subsequent decisions of this court as to chattel mortgages, not available as against general creditors, from the omission of certain statutory requirements, and which defects existed at the time of the assignment. *Hanes v. Tiffany*, 25 Ohio St. 549; *Kilbourne v. Fay*, 29 Ohio St. 264. But no conclusion has been reached, either way, upon this question, by a majority of the court.

There is, however, another question in the case; that is, whether the deed to Campbell need have been recorded to entitle him, upon distribution, to a preference over the claims of general creditors, as less than six months had expired from the execution of it to the time of the assignment? The majority are of opinion that this question should be answered in the negative.

The deed, although intended to secure Campbell for moneys he had advanced, paid, and assumed for Simmonds, was, nevertheless, absolute in form, and conveyed to him the legal title to the premises in fee-simple. It is not a proper mortgage. In equity it is construed to be such for the purpose of preventing imposition and injustice; but at law it is simply what, on its face it purports to be, an absolute conveyance in fee-simple. *Hughes v. Davis*, 40 Cal. 117; 1 Jones Mortg., § 339. And no other or different construction will be placed on the deed, unless necessary to accomplish the ends of justice. 1 Jones Mortg., § 321. To do otherwise

would be foreign to the spirit of equity, and would violate the plainest principles upon which equity jurisprudence has always been administered by the courts. No one of the maxims of equity is of more unvarying application than that "he who seeks equity must do equity."

The remedial right of the grantor is not that of foreclosure, but of redemption merely, which can only be exercised upon the principle stated. *White v. Lucas*, 46 Iowa, 819; *Cowing v. Rogers*, 84 Cal. 648. Hence the grantor on redeeming or seeking a reconveyance must comply with his agreement and pay the amount due. 1 Jones Mortg., § 336. The only proper decree, in such cases, is for a reconveyance of the land upon the payment of the amount found due the grantee. *Campbell v. Dearborn*, 109 Mass. 130; *Westlake v. Horton*, 85 Ill. 228. And, differing from an ordinary mortgage, a reconveyance is required to reclothe the grantor with the legal title, although payment has been made. *McCarthy v. McCarthy*, 36 Conn. 177.

In *Baird v. Kirtland*, 8 Ohio, 21, it was held that where there is an absolute conveyance of land, intended as a mortgage, and a separate covenant by the grantee to reconvey to the grantor, on the payment of a sum of money, the equity of redemption remaining in the grantor can not be sold on execution at law; and the holding was placed on the ground that the judgment debtor did not have a legal title to the land. Hitchcock, J., in delivering the opinion, says: "In equity, he" the grantor "might upon such payment, compel a reconveyance; but at law he had no interest in the land—therefore the judgment of the complainants could not operate as a lien upon the land."

It may be conceded that the principles above stated apply without qualification as between the parties to the deed, whilst it would be contended that their application to a case arising between the creditors of the grantor and his grantee is prevented by the policy of our registration laws. It has been the purpose of our reasoning to show that there is a marked difference between an absolute deed held to be a mortgage and a deed that is intended to be,

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and is, a mortgage upon the face of it; and that this difference consists in the remedial rights of the parties and in the principles upon which such relief is granted. If this difference exists, and plainly as between parties it does, then it is difficult to see how those who may desire to succeed to the rights of the maker of an absolute deed, which in equity may be a mortgage, can do so, as creditors or otherwise, without invoking the same equitable powers in the court, that could only have given relief to the grantor himself; and if they can not, then upon what equitable exception could relief be rendered them without complying with the maxim, that would have been applicable to him, that he who seeks equity must do equity; as they, as well as he, must ask that the deed be declared to be something other than what on its face it purports to be; and such relief can only be awarded in the exercise of its equitable jurisdiction by a court. The maxims of equity is the life of its system of remedial justice, and a judgment disregarding any of its maxims, where applicable, is not a judgment in equity.

In commenting on the maxim, "he who seeks equity must do equity," Prof. Pomeroy quotes with approval the following language of an eminent judge: "The court of equity refuses its aid to give to the plaintiff what the law would give him if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the court considers he ought to comply with, although the subject of the condition should be one which the court would not otherwise enforce," and adds: "In this narrow and particular sense the principle becomes a universal rule governing the courts of equity in administering all kinds of equitable relief, in any controversy where its application may be necessary to work out complete justice." 1 Pom. Eq. Juris., § 385. The following are some of the many instances in which the principle has been applied: Where a borrower brings a suit in equity for the purpose of having a usurious bond or other security that is void by statute, delivered up and canceled, the relief will be granted only upon condition that the plaintiff himself does equity,

by repaying to his creditor what is justly and in good faith due, that is, the amount actually advanced with lawful interest, unless indeed the statute has gone so far as to expressly prohibit the court from imposing such terms as the price of its relief. 1 Pom. Eq. Juris., § 391, and cases cited in note 2.

So in *Heacock v. Swartwout*, 28 Ill. 291, where an absolute conveyance was ascertained to be a security for a usufructuous loan, the court allowed the grantor to have a conveyance of the land on paying the grantee the original money loaned at six per cent, but denied him the benefit of the forfeitures given by the statute, saying: "When a party asks the court of equity for relief from the letter of his contract, which he could not obtain at law, the court will impose terms upon him to do equity."

See also *Cowing v. Rogers*, *supra*, where upon the same principle the grantor was required to pay in gold coin, as the condition upon which the court would decree a reconveyance of land held by the grantee under a deed absolute in form, but found to be a security.

It appears to us the same equitable principle must apply to the case of a creditor seeking the aid of equity to have a deed of his debtor, absolute in form, declared a mortgage; the relief can only be granted upon condition that he pay the grantee the amount with interest justly due him. The relief will not be granted that his claim may, when the relief is granted, be declared a superior lien to that of the grantee as a consequence of his omission to record the deed as a mortgage.

So far as our examination has gone, we have not been able to find any case arising between creditors and the grantee in which the application of these principles has been regarded as disturbed by the policy of the registration laws. Whilst it is uniformly held that a creditor may subject the grantor's equity of redemption to the payment of his claim, it is always with the qualification that it must be done upon the payment of the amount justly due the grantee. *Van Buren v. Olmstead*, 5 Paige, 9.

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In *Westfall v. Westfall*, 16 Hun (N. Y.), 541, the action was on behalf of the widow; in *Judge v. Reese*, 24 N. J. Eq. 387, it was by a judgment creditor; and so in *Allen v. Kemp*, 29 Iowa, 452; in *De Wolf v. Strader*, 26 Ill. 225; in *Marshall v. Stewart*, 17 Ohio, 356; and in *Dwen v. Blake*, 44 Ill. 135.

If it be said that the question was not made in these cases, the answer is that they are, nevertheless, evidence of what the law has been and is regarded to be. *Marshall v. Stewart*, *supra*, was decided in 1848; the statute as to recording mortgages having been enacted in 1831, and the declaratory act in 1838. 1 S. & C. 458; Id. 469.

In *Christie v. Hale*, 46 Ill. 117, the court observes that it has never been held where a conveyance is made in good faith as security for a debt, that because the grantee could not claim all that he seemed to hold by the deed, he should not hold a lien subject to the equities of the grantor.

The observation in *Clark v. Condit*, 18 N. J. Eq. 362, was based upon the statutes of that state, which provide that "every deed of mortgage or conveyance in the nature of a mortgage" must be recorded to make it available against subsequent *bona fide* purchasers and mortgagees without notice. Revised Statutes N. J. 705-6.

It is important in this connection to notice the language of our own statutes on the subject. Section 4133, Revised Statutes, provides that "all mortgages executed agreeably to the provisions of this chapter" (Chap. I, Tit. iv, Part 2) shall take effect from the time they are delivered for record; and the next section provides that "all other deeds and instruments of writing for the conveyance or *incumbrance* of any lands" executed agreeably to the provisions of the same chapter shall be recorded in six months from the date thereof, and if not so recorded they are deemed to be fraudulent as against any subsequent *bona fide* purchaser without notice. We refer to the provisions of this section as they were prior to the amendment of May 4, 1885 (82 Ohio L. 230).

Inasmuch as the latter section recognizes the existence

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of a deed for the incumbrance of lands, that would take effect upon its execution and delivery, as a deed for the conveyance of lands, it is fair to construe the former section as simply embracing mortgages that, in law, are such upon the face of them.

The deed held to be a mortgage and required to be recorded as such in *Woodruff v. Robb*, 19 Ohio, 212, was clearly so upon the face of it; for, although made to a trustee, it was by the clause of defeasance to become void on the payment of the money by Robb. 1 Jones Mort., § 62. And so within the act as to the record of mortgages.

Here there was no such provision in the deed; it was absolute upon its face. The proposition of Campbell, upon which the conveyance was made to him, was for a purchase of the property at the estimated value of \$18,000. This he was to pay by assuming a mortgage of \$12,530 on the premises, and an indebtedness of \$320 to Campbell's firm; the balance he proposed to pay by the allowance of his own claim of \$2,100 for money he had loaned S., and cash, \$3,050; then S. was to remain in the premises for one year rent free, and if he did not then repay the money advanced, with interest, he was to surrender the premises; and if he did Campbell was to reconvey them to Simmonds. There was no promise by Simmonds to pay; it was his privilege to do so and claim a reconveyance of the property. The absence of a promise to pay and of a provision in the deed that upon payment the conveyance should be void, marks the distinction between a proper mortgage and an absolute conveyance, with a right reserved to the grantor to claim a reconveyance upon the payment of money.

The fact that the deed had not been recorded at the time of the assignment can avail nothing, because it was recorded within a few minutes after, and within the time allowed by law. And as said by Chief Justice Marshall, in *Shirras v. Caig*, 7 Cranch, 50: "If subsequent purchasers without notice, sustain an injury within the time allowed for recording a deed, the injury is to be ascribed to the law, not to the individual who has complied with its requirements."

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There is no ground here for saying that any body was injured by a failure to record the deed sooner than it was recorded. After paying the charges and liens upon the property, the residue is insufficient to pay Campbell the amount found due him for moneys paid and advanced at the time of the conveyance; and it is not shown that any of the creditors had sought to acquire a lien upon the property that would have been available but for this deed. The only interest they have in the property is that acquired by the assignment.

Transactions which in equity are construed as mortgages, arise under a great variety of forms, to many of which, if not all, it would be difficult to apply the statutes applicable to the registration of mortgages proper. Thus, where a land agent purchased lands at a government sale for one who had a right in them, simply recognized by the custom of settlers, and took the title to himself as a security for the money advanced by him to the settler (*Rogan v. Walker*, 1 Wis. 527), and where the owner of a certain tract of land, obliged himself to pay a certain sum of money in a certain time, and in default thereof to convey the lands (*Cotterell v. Long*, 20 Ohio, 464), and where a purchaser at a sheriff's sale, made the purchase and took the deed under an arrangement with the judgment debtor, whereby the purchaser was to advance money and pay off certain claims against the debtor, and to convey to the debtor, when reimbursed, for the moneys so advanced (*Sweetzer's Appeal*, 71 Pa. St. 264), and the absolute assignment of a mortgage as a collateral security (*Pond v. Eddy*, 113 Mass. 149), have each been held to constitute a mortgage.

As a rule, the character of such instruments is only ascertained and determined after more or less litigation, and the decree no doubt frequently works a hardship to the grantee, who had taken the deed and acted upon what he had regarded as a fair construction of the transaction; and, as between himself and a creditor, to go beyond the principles just stated, and apply the consequences that would

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follow at law from a failure to register the deed as a mortgage, would, as a rule, shock the conscience of any court. Nor do we see any reason why Campbell or any other grantee should be dealt with any more severely for voluntarily doing what he might have been compelled to do at the end of a suit. The difference, if any, should, in such case, be in his favor.

Judgment affirmed.

SPEAR, J., dissents.

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Injunction bond—Construed with reference to statutes in force at time given—Dismissal of action—Section 5576 Revised Statutes.

1. The terms of an undertaking for an injunction, construed by the statutes in force at the time of giving the same, govern as to the liability of the sureties signing it.
2. An injunction undertaking was given in accordance with section 5576 of the Revised Statutes, and was conditioned: "that the plaintiff shall pay to the defendants the damages which they or either may sustain by reason of the injunction in this action, if it be finally decided that the injunction ought not to have been granted." On motion of part of the defendants, and because co-defendants had not been served with summons, the court dismissed the action without prejudice to another action, and the injunction was dissolved, and the costs were paid by plaintiff. Thereupon suit was brought, on the undertaking, for damages claimed by reason of the injunction. *Held*: 1. Such dismissal of the action without prejudice, and such dissolution of the injunction, do not constitute a breach of the condition of the undertaking.
3. The sureties thereon can not be required to pay damages for such injunction until it is "decided that the injunction ought not to have been granted."

ERROR to the District Court of Hamilton county.

On March 2, 1880, Mildred F. Bascoe brought a suit in the court of common pleas of Hamilton county against John W. Bishop and Amanda H. Bishop, his wife, and Edward L. Bishop, May Bishop, Howard C. Bishop, and Daisy Bishop, heirs at law of James W. Bishop and Jane

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B. Bishop, widow of James. The object and prayer of the suit was to have an instrument, in form a deed, declared to be a mortgage, and for relief against the defendants therein.

Afterward, on March 23, 1880, John W. and Amanda Bishop brought suit of forcible detainer before a justice of the peace against Bascoe to obtain possession of the real estate described in the instrument. Thereupon Bascoe filed an affidavit in her suit in the court of common pleas, and applied for an injunction restraining the Bishops from proceeding with the suit before the justice of the peace. The court granted a temporary injunction as prayed for, on the filing and approval of the following undertaking:

"We, Simon Krug and Frank Bruner, of the county of Hamilton and state of Ohio, bind ourselves to the defendants, John W. Bishop, Amanda H. Bishop, Edward L. Bishop, May Bishop, Howard C. Bishop, Daisy Bishop and Jane B. Bishop, in the sum of two hundred and fifty (\$250.00) dollars, that the plaintiff, Mildred F. Bascoe, shall pay to the said defendants, the damages which they or either may sustain by reason of the injunction in this action, if it be finally decided that the said injunction ought not to have been granted.

Cincinnati, Ohio, April the 5th, one thousand eight hundred and eighty.

SIMON KRUG.

FRANK BRUNER."

No summons was served on the Bishops, but the order of injunction was served upon all but John W. Bishop and Amanda H. Bishop, and the court made an entry as follows:

"By consent of parties in open court a temporary injunction is granted herein, and the defendants, and each of them, are hereby restrained and enjoined from prosecuting the action in forcible detainer against the plaintiff, before Nathan Marchant, justice of the peace, or in any way disturbing the possession of the plaintiff in and to the premises in the petition described, until the final determination of this action by this court. This order of injunction to take

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effect upon the execution by the plaintiff to the defendants, with surety to the approval of the clerk of this court of an injunction bond or undertaking in the sum of two hundred and fifty dollars (\$250.00)."

On February 25, 1881, Amanda H. and John W. Bishop appeared and filed an answer and cross-petition in the case, setting up title and praying that their title might be quieted. On March 8, 1881, John W. and Amanda H. Bishop moved the court to dissolve the injunction granted, for the reason that the facts stated in the petition and affidavit as the grounds asking for the injunction were not true. Upon hearing on affidavits the court refused to dissolve the injunction until the case should be tried upon its merits. May 9, 1881, the defendants, John W. and Amanda H. Bishop moved the court to dismiss the action because of plaintiff's unreasonable neglect to serve summons on the other defendants, Edward L. May, Howard C., Daisy, and Jane B. Bishop; and the court sustained the motion and dismissed the action without prejudice, at the costs of Bascoe, who paid the same.

And the forcible detainer suit before the justice of the peace was dismissed and costs paid by John W. and Amanda H. Bishop. After the court dismissed the action and the injunction was dissolved, the defendants in error brought suit against the plaintiffs in error on the undertaking for the injunction, averring that, on May 16, 1881, the court dismissed the action and dissolved the injunction at the costs of M. F. Bascoe, and claiming damages for rents and profits of the premises, counsel fees, loss of time, and cash expended, and prayed judgment against the sureties for the full amount of the undertaking. The plaintiffs in error answered, and, among other things, they averred as answer 6, "that it was a condition of their said obligation that they were only to be liable on their bond in case it was finally decided that the injunction ought not to have been granted. They deny that it has been finally decided, that the injunction ought not to have been granted, but on the contrary, they allege that the said injunction ought to have

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been granted." A demurrer to this part of the answer was sustained, and on the trial judgment was rendered against the plaintiffs in error for the full amount of the undertaking.

On proceedings in error the district court affirmed the judgment of the court of common pleas, and plaintiffs in error now seek a reversal of those judgments.

Alfred Yaple and W. H. Baldwin, for plaintiffs in error.
P. A. Reece, for defendants in error.

FOLLETT, J. Are the sureties liable in this action? This depends upon our statutes and the condition of the undertaking. Section 5576 of the Revised Statutes provides that the undertaking shall be: "to secure to the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted." Under this provision of the statute the undertaking was given conditioned: "that the plaintiff, Mildred F. Bascoe, shall pay to the said defendants the damages which they, or either, may sustain by reason of the injunction in this action if it be finally decided that the said injunction ought not to have been granted."

The answer sets up that the sureties were to be liable only in case it was finally decided that the injunction ought not to have been granted, and that it has not been finally decided that the injunction ought not to have been granted. All this the demurrer admits. But it is claimed that the dissolution of the injunction is such a final decision as that the condition of the undertaking was broken when the action was dismissed by the court and the injunction was dissolved, though the action was not heard or dismissed upon its merits, and the forcible detainer action was also dismissed by the Bishops without trial. The dissolution of the injunction was consequent upon the dismissal of the action of Bascoe against the Bishops. Section 5313 of the Revised Statutes provides: "The court may dismiss the petition with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to

serve the summons on other defendants." And John W. Bishop and Amanda H. Bishop, having failed to obtain the dissolution of the injunction without a hearing upon the merits of the case, procured the dismissal of the action without prejudice, "because of plaintiff's unreasonable neglect to serve summons on the defendants, Edward L. Bishop, May Bishop, Howard C. Bishop and Daisy Bishop, heirs at law, and Jane B. Bishop, widow of James W. Bishop, deceased," as shown by the record.

Such a dismissal without prejudice is provided for by section 5314, of the Revised Statutes, as follows: "An action may be dismissed without prejudice to a future action . . . 3. By the court, for the want of necessary parties. 4. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence." Such a dismissal is not a final decision on rights in the action, or on plaintiff's right to the injunction. But it takes away any prejudice to the parties to determine in another action, any right either party may have in the action dismissed.

The action *was* so dismissed *without prejudice*, or the dismissal is void and the action is pending in that court. Such a judgment of dismissal is an entirety. See *Wanzer v. Self*, 30 Ohio St. 378, where the court says: "A judgment dismissing an action without prejudice to a future action is an entirety, and, though it may have been so rendered erroneously, it will not constitute a bar to a subsequent action upon the same subject-matter."

If the action was not dismissed without prejudice, how stands the claim of title to the premises in the same action, set up in their answer and cross-petition by John W. Bishop and Amanda H. Bishop, especially after they dismissed their cross-petition and the action so enjoined? Are such dismissals decisive against them? Sureties are bound by the conditions of their agreements, by the terms of their bond. This is shown by the very cases cited by defendants in error. And until "it be finally decided that the

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said injunction ought not to have been granted," Krug and Bruner can not be required to respond for any damages by reason of the injunction. The demurrer to their sixth matter of defense admits that such a final decision has not been made, and the demurrer should have been overruled.

See *Bein v. Heath*, 12 How. (U. S.) 168.

The court erred in sustaining that demurrer, and the district court erred in affirming the judgment of the court of common pleas.

The judgments of the district court and of the court of common pleas are reversed, and the demurrer to the sixth matter of defense is overruled and judgment for the sureties is rendered at the costs of the defendants in error.

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Master and servant—Remedy of servant for wrongful discharge.

Where an employe, engaged under a contract for a specified time, the wages being payable in installments, is wrongfully discharged before the expiration of the period of hire, and all wages actually earned at the time of the discharge have been paid, an action will not lie to recover the future installments, as though actually earned, but the remedy is by action for damages arising from the breach of the contract, and one recovery upon such claim is a bar to a future action.

ERROR to the District Court of Allen county.

Isaiah Pillars and Prophet & Eastman, for plaintiff in error.

A servant who has been wrongfully discharged from service before the expiration of the term for which he was hired, has an election of remedies. He may regard the contract as broken and sue immediately for its breach. He may treat it as rescinded, and sue on a *quantum meruit* for the services he has performed under it. Or he may treat it as still subsisting, and sue at the expiration of the term for the sum agreed to be paid for the whole term. *Decamp v. Hewitt*, 43 Am. Dec. 204.

The first recovery was not a bar. *Huntington v. Ogden*—

44s	226
47	554
44s	226
48	334
44	226
54	163
54	227

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burgh & L. C. R. Co., 7 Am. L. Reg. (N. S.) 143; *Strauss v. Meertief*, 64 Ala. 299; s. c. 38 Am. Rep. 8; *Davis v. Ayers*, 9 Ala. 292; *Ramey v. Holcombe*, 21 Ala. 567; *Fowler v. Armour*, 24 Ala. 194; *Hartley v. Harman*, 11 Ad. and E. 798; *Heim v. Wolf*, 1 E. D. Smith, 70; *Hamlin v. Race*, 78 Ill. 422; 8 South. L. Rev. 432.

If the wages are payable in installments, the servant may sue for and recover each installment as it becomes due. *Davis v. Preston*, 6 Ala. 83; *Armfield v. Nash*, 31 Miss. 361; *Fowler v. Armour*, *supra*; *Thompson v. Wood*, 1 Hilton, 96.

The law will not presume the servant could have obtained like employment at the same wages in the same vicinity. Such defense must be plead, if not in bar, at least in mitigation. See *Congregation v. Peres*, 2 Cold. (Tenn.) 620; *Chamberlin v. Morgan*, 68 Pa. St. 168; *King v. Steiren*, 44 Pa. St. 99; *Sherman v. Champlain Trans. Co.*, 31 Vt. 162; *Costigan v. M. & H. R. Co.*, 2 Denio, 616; *Howard v. Daly*, 61 N. Y. 371; 6 M. G. & S. 174; *Collins v. Woodruff*, 4 Eng. (Ark.) 464; *Gillis v. Space*, 63 Barb. 177.

Mead & Townsend, for defendant in error.

It was held, by Lord Ellenborough, in *Gandell v. Pontigny*, 4 Camp. 375, that a servant wrongfully dismissed before the expiration of the period for which he was hired, could, upon tender of his services, treat the contract as subsisting, and sue the master for his wages as and for a constructive service.

But that case, after repeated discussion by the English courts, was overruled in *Goodman v. Pocock*, 15 Ad. & Ell. 576, and the doctrine of constructive service distinctly repudiated. To the same effect see *Fewings v. Tisdal*, 1 Exch. 295.

Some of the earlier decisions of the *nisi prius* courts favored the doctrine as announced by Lord Ellenborough: *Thompson v. Wood*, 1 Hilt. 96; *Huntington v. Ogdensburg & L. C. R. Co.*, 33 How. Pr. 416; *Heim v. Wolf*, 1 E. D. Smith, 73, but these cases were overruled in *Howard v. Daly*, 61 N. Y. 362.

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There could be no recovery by the plaintiff as and for a constructive service. After his dismissal he could not recover for *services*, for they were not rendered. His remedy rested in an action for a breach of the contract. *Chamberlain v. Morgan*, 68 Pa. St. 169; *Moody v. Leverich*, 4 Daly, 401; *Ricks v. Yates*, 5 Ind. 115; *Willoughby v. Thomas*, 24 Gratt. (Va.) 522; *Chamberlin v. McCalister*, 6 Dana (Ky.) 352; *Miller v. Goddard*, 34 Me. 102; Sedgw. Dam. 418 n.; Wood's Mayne Dam. 317-328; Abb. Trial Ev. 384; Wood's Master and Servt. 246-7; *Clossman v. Lacoste*, 28 Eng. L. & Eq. 140.

A contract for services for a given time, although the wages may be paid by the week or month, is a single and entire contract. *Perry v. Dickerson*, 85, N. Y. 345; *Colburn v. Woodworth*, 31 Barb. 381; *Secor v. Sturgis*, 16 N. Y. 548.

The first suit and recovery had by the plaintiff must be held to have been for general damages for breach of the contract, whether so intended by him or not. 1 *Southerland Dam.* 175-184; *Toles v. Hazen*, 57 How. Pr. 516; *Farrington v. Payne*, 15 John. 432; *Smith v. Jones*, 15 John. 229; *Miller v. Covert*, 1 Wend. 487.

The plaintiff is limited to one recovery. *Ewing v. McNairy*, 20 Ohio St. 322; *Cov. & Cin. B. Co. v. Sargent*, 27 Ohio St. 233; *Swenson v. Cresop*, 28 Ohio St. 668; *Champion v. Griffith*, 13 Ohio, 228; *Hackworth v. Zollars*, 30 Iowa, 433; *Gray v. Dougherty*, 25 Cal. 266; 9 Wis. 23; 3 Comst. 511; 5 Sandf. 135.

SPEAR, J. This action is brought to recover for wages claimed to be due from the defendant to the plaintiff upon a contract made December 13, 1881, whereby, in consideration that plaintiff would faithfully and diligently serve the defendant as superintendent of the stone and brick work in the construction of a court house, then in process of erection at Lima, until the stone and brick work should be completed, etc., the defendant agreed to employ plaintiff as such superintendent during the period aforesaid, and to pay him for his services at the end of each and every

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month the sum of one hundred dollars. The petition avers that the plaintiff entered upon the employment and discharged the duties thereof until April 6, 1882, when, although the stone and brick work was not completed and the plaintiff was and has since been ready and willing to perform all the conditions of said agreement upon his part, the defendant refused to allow him so to do, and to pay him therefor, and discharged him therefrom without any reasonable cause, and has since hitherto refused to employ plaintiff for the remainder of said term. On the 18th day of August, 1882, plaintiff duly requested defendant to pay him his wages due him for his services upon and by reason of said contract for the period of two months from the 13th day of June, 1882, to the 13th day of August, 1882, which defendant refused to do, whereby plaintiff has lost the wages he otherwise would have obtained from said employment from said June 13, 1882, to August 13, 1882, to his damage in the sum of \$200, for which, with interest from August 13, 1882, he asks judgment.

The answer of the defendant sets up in bar an alleged former recovery for the same cause of action, between the same parties, upon the same contract, at the October term, 1882, of the court of common pleas of Allen county, at which term a judgment upon the merits was rendered in favor of the plaintiff for \$205.30. The petition of the plaintiff in the former case is set out and is identical with the petition in the present case except as to time, the pleader averring in the first petition loss of wages from April 13, 1882, to June 13, 1882, and asking to recover for that.

To this answer a demurrer was interposed, which was overruled by the court of common pleas, and judgment entered for defendant, which judgment was affirmed by the district court. To reverse this judgment of affirmance the present action is prosecuted in this court.

The question presented is, whether, under such a contract as is here set out, the employee can, after being discharged, nothing being due him for wages actually earned,

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maintain an action for each installment as though earned, upon an allegation of readiness to perform the work; or, whether his action is simply one for damages for the employer's breach of contract, and he is limited to one action and one recovery for such damages.

If he can have his option as to these remedies then the cause of action in the first petition was not the same as in the present one, and the former judgment would not be a bar; if he cannot, but is limited to the last named remedy, to wit: to damages for breach of the contract, then, if both are based upon the same breach, it would follow that they are identical, and that one recovery would necessarily exhaust the plaintiff's remedy, and so the former recovery would be a bar. There is but one dismissal, but one breach, pleaded. The dismissal was one act. And, as to recovery of damages for that, plaintiff could not split up his cause of action, recovering a part of his damages in one suit, and the remainder afterward. He must include all that belonged to that cause of action in his first petition, so that one suit and one recovery should settle the rights of the parties. It would be at his own risk and peril if he negligently or ignorantly omitted a part of what might properly have been embraced in the cause of action in his first suit. His mistake, if he made one, might be matter of regret, but that could not change the rule of law.

The contention in support of plaintiffs' claim is, that neither action was brought to recover damages for breach of contract on the part of the board, but that the plaintiff, having his option, upon being discharged, either to regard the contract as broken by the conduct of the employer and sue immediately for damages for its breach, or treat the contract as subsisting for all purposes and maintain an action for each installment as it became due, chose the latter, and this he might do, because, having been discharged without fault on his part, his rights were not lessened, nor was he bound to treat the contract as at an end. Having this choice of remedies, it is insisted, one suit to recover upon installments past due at the commencement of the

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action, and judgment thereon would not bar a future recovery upon installments coming due thereafter. A contrary view, it is argued, would entail great injustice. Under it the employe would be compelled, unless he were content with such meager damages as he could prove immediately after his discharge, or, at most, with less than his real loss, to wait until all were due before recovering any thing, and inasmuch as the object in contracting for pay by the month probably was that he might thus support himself and family, they would be left to suffer while waiting for the last installment to become due, and he would thus be driven, in any event, to unreasonable hardships and to a sacrifice of his rights, because of the wrongful act of the employer, a condition of affairs which the law would not justify.

That the doctrine contended for appeals strongly to the feelings, and is not without plausibility, would seem to be apparent from the statement, and that it has met with the favor of courts in several instances is apparent from an examination of the cases cited by counsel. Still, the question remains, does it rest upon solid foundation? The first case in order of time is that of *Gandell v. Pontigny*, 4 Campbell, 375, decided at *nisi prius* at Sittings after Hilary term of the King's Bench, in 1816, by Lord Ellenborough. Plaintiff was clerk for defendant at two hundred pounds per year payable quarterly. August 11th defendant discharged plaintiff and paid him for half quarter between 1st July and 15th August. Plaintiff denied the power to discharge and offered next day to continue work, which defendant declined. Lord Ellenborough's decision is as follows: "If the plaintiff was discharged without sufficient cause, I think this action is maintainable. Having served a part of the quarter and being willing to serve the residue, in contemplation of law he may be considered to have served the whole. The defendant was therefore indebted to him for work and labor in the sum sought to be recovered."

John Wm. Smith, in his note to *Cutter v. Powell*, 2 Smith's L. C. part 1, says that a servant wrongfully dis-

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missed has his election of three remedies. First, a special action for breach of contract, and this remedy he may pursue at once; second, he may wait until the termination of the period for which he was employed, and then, perhaps, sue for his whole wages in *indebitatus assumpsit*, relying on the doctrine of constructive service, and he cites *Gandell v. Pontigny*.

Two cases are cited from the supreme court of New York, where a similar doctrine is held. In *Huntington v. O. & L. C. Railroad Company*, reported in 7 Am. Law Register (N. S.), 143, decided by James, J., the holding is that "where a person employed for a certain time, at a fixed salary, payable monthly, is wrongfully discharged before the end of the term, he may sue for each month's salary as it becomes due; and the first judgment will not be a bar to another action for salary subsequently coming due." In the case of *Thompson v. Wood*, 1 Hilton, 96, Ingraham, J., says: "Where an agreement of this kind is broken, the person employed has his election, either to sue for his wages as they become due from time to time, or to bring one action for damages for the breach of the contract." This holding that the employe may sue for wages as they become due from time to time was not necessary to a decision of the case, and was, apparently, based upon the holding of Lord Ellenborough, before quoted. *Strauss v. Meertief*, 64 Ala. 299, is to the same effect. Brickell, J., in deciding the case, says: "It is not matter of doubt, that when a contract is made for personal services, for a particular term, at stipulated wages, if the party employed is, without cause, discharged during the term . . . he is not compelled to accept the breach of his employer as a termination of the contract; he may elect to treat it as continuing, and, keeping himself in readiness to perform the contract as his part, may recover the wages due on the expiration of the term. And, if the wages are payable by installments, he may sue for and recover each installment as it becomes due." Other cases by the same court hold a like doctrine, and it seems to have been accepted by the courts of Mississippi, Missouri, Illinois, and Wisconsin.

The decisions in these cases appear to rest upon the doctrine of "constructive service." In several of them it is adopted in words; in others the principle is assumed without designating it by that title. If that is not their basis it is difficult to see that they have any. The theory of that doctrine seems to be that inasmuch as the employe holds himself ready to do the work, therefore he has done the work; that readiness is, for all purposes, equivalent to performance. For the purpose of allowing a recovery in some amount his readiness to do and tender of performance may have the effect of performance to the extent of putting the employer in the wrong, but how can it be said, in truth, that he has done the work? that he has performed? The claim is based upon a fiction, an untruth. There is no acceptance of the services; there is no delivery of them; the defendant has not had the benefit of them; he has not had value received, and upon what principle is it that in law he is liable for the agreed price when he has not received the commodity which he agreed to buy, and the other party has not parted with the commodity which he agreed to sell? The doctrine of "constructive service," as applied to a case of this character, is one beset with difficulties. It requires a plaintiff to assume that to exist which in fact has no existence. He is demanding wages when he has rendered no service. The doctrine contradicts the very term itself. How can he truthfully aver, as in *indebitatus assumpsit*, that the defendant is indebted to him *for work and labor done*? Averting it, how could he prove it? But, aside from the matter of pleading and proof, in order to recover upon the strength of this doctrine, the employe must not only be willing to perform on his part, but must hold himself in readiness to perform. This implies that he will remain idle. Public policy, not to say public morals, forbids the encouragement of an idle class. Being subject to the universal rule that a person injured by the act of another is bound to use ordinary diligence to make the damage as light as may be, the discharged employe must use ordinary care to obtain employment. He may not be required to

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seek elsewhere, or to engage in a different industry. But he is bound to use ordinary effort to obtain similar employment in the same vicinity; at least if such employment is offered he is bound to take advantage of it. It would be a direct encouragement to idleness to hold that he who may have, but refuses, similar service, is entitled to full compensation the same as though he performed full labor. This rule stands squarely across the path of "constructive service." For if the workman is bound to accept employment of another employer how can he continue ready to resume work under his former employer? A learned writer, whose valued paper in support of the doctrine of "constructive service" is cited by counsel, uses this language: "The doctrine of constructive service, however, does not permit an employe who has been wrongfully discharged to remain willfully idle during the period for which he had been engaged." A most singular conception of the ground work of the doctrine, it seems to us. Being actually at work for B., how can he be constructively at work for A.? Being required to hold himself in readiness to resume his work for A., how can he engage with B.? Engaging with B., how can he be ready to resume work with A.?

"Constructive service," as here sought to be applied, never had, as we think, support in principle, and the support derived from authority is at least very considerably impaired. The case of *Gandell v. Pontigny*, after being followed in several cases in England, was overruled in *Archard v. Honor*, 3 Car. & P. 349, which was approved in *Smith v. Hayward*, 7 Ad. & Ell. 544, and in the later case of *Goodman v. Pocock*, 15 Ad. & Ell. (N. S.) 576. To like effect will be found *Beckham v. Drake*, 2 H.L. 606, and *Emmens v. Elderton*, 4 H.L. 645. Mr. Smith's second proposition in his notes to *Cutter v. Powell* is expressly disapproved in *Goodman v. Pocock*, Erle, J., observing: "As to the other option referred to by Mr. Smith, I think that the servant can not wait till the expiration of the period for which he was hired, and then sue for his whole wages on the ground of a constructive service after dismissal. I think the true measure of dam-

ages is the loss sustained at the time of the dismissal." And in *Clossman v. Lacoste*, 28 E. L. & E. 140, a still later case, Lord Campbell says: "But if the contract is entirely broken, and the relation of employer and employed put an end to, I agree that the party suing ought to allege in his declaration the whole *gravamen* that he suffers by such breach of contract; and that he may receive therein all the damages that may inure to him in consequence." So that, it may not be too much to say, that the doctrine of "constructive service" has, in England, where it had its origin, been repudiated, and the law there established that a servant wrongfully discharged has no action for wages unless something is due for past services actually rendered, and as to any other claim on the contract it is for the breach of it, and for his damages resulting therefrom, being the ordinary action for damages, and not the common-law action of *indebitatus assumpsit*. Nor are the cases in New York heretofore referred to now authority in that state? For this see *Moody v. Leverick*, 4 Daly, 401, where the holding is to the effect that a servant wrongfully dismissed can not wait until the expiration of the period, and then sue for his whole wages on the ground of constructive service, his only remedy being an action for breach of contract of hiring. Also, *Howard v. Daly*, 61 N. Y. 362, where *Gandell v. Pontigny*, *Thompson v. Wood*, and the cases in Alabama, Mississippi, Missouri, and Wisconsin are distinctly disapproved, and the doctrine of "constructive service" declared to be "so opposed to principle, so clearly hostile to the great mass of authorities, and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we can not accept it. . . . The doctrine of constructive service is not only at war with principle, but with the rules of political economy, as it encourages idleness, and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their

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stipulated amount of labor." The cases of *Chamberlin v. Morgan*, 68 Penn. St. 168; *Willoughby v. Thomas*, 24 Gratt. (Va.) 522; *Whitaker v. Sandifer*, 1 Duval (Ky.) 261; *Chamberlin v. McCalister*, 6 Dana (Ky.) 352, and *Miller v. Goddard*, 34 Maine, 102, show that a like view is held by the courts in those states, while Wood's *Mayne on Damages*, 317, 328, and Wood's *Master and Servant*, 246-7, indicate that that author considers the great weight of authority to be in the same direction. On page 246 of the latter work Mr. Wood uses the following emphatic language: "It (the doctrine of constructive service) was finally exploded, and the doctrine established that a person wrongfully discharged could not, by simply holding himself in readiness to perform his contract, be regarded as having *in fact* performed it, and thus be entitled to sue for and recover his wages for the entire term, but that he must be restricted in his recovery to the amount of his actual loss. The action in such cases is not for wages but for *damages* for breach of the contract. It can not with any propriety be claimed that an action for wages can be sustained when the servant has in fact rendered no service. Such a doctrine is in defiance of the meaning of the term, and rests upon no solid foundation either in principle or policy." See, also, an instructive paper by Mr. Thornton, of the Indianapolis bar, on this subject, in 8 *Southern Law Review*, 432; and for a full discussion of the present case, see the able opinion of the judge who presided in the common pleas, reported in 9 *Week. Law Bulletin*, 186.

To sustain the doctrine of "constructive service" would be in effect to hold that the contract is one which could be enforced specifically, for if, after discharge, and after the employer had repudiated the contract on his part and laid himself liable to full damages for its breach, the employe could treat the contract as subsisting in such sort as to recover upon installments as wages earned, when in fact they were not earned, and recover as each came due, the result would be a specific performance of the contract, and that,

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too, by a multiplicity of suits. Surely no lawyer would seriously ask a court of equity to specifically enforce a contract which, in its nature, gives to the aggrieved party so plain and full a remedy at law in an action for damages.

As a result from the authorities, as well as upon principle, we are satisfied that in such a contract as the one in the case at bar, where the employe is wrongfully dismissed, but all wages actually earned up to that time are paid, the only action the employe has, whether he bring it at once or wait until the entire period of hire has expired, is one for damages for the breach of the contract, and the measure of damages will be the loss or injury occasioned by that breach; and one recovery upon such claim, whether the damages be denominated loss of wages, or damages for breach, is a bar to a future recovery.

Judgment affirmed.

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Will—Power of appointment—Abuse of power.

1. Where a testator invests his widow with a life estate in his property, with power to dispose of the remainder to his heirs, an attempted appointment of it in such manner as to secure to herself a substantial pecuniary benefit from its disposition, not authorized by the testator, is an abuse of such power of appointment and is void.
2. An innocent motive, or an honest misconstruction of the power conferred will not save the exercise of the power, if the true purpose of it is violated.
3. A testator, possessed of real estate worth \$6,600, and personal property sufficient to pay his debts, devised and bequeathed to his widow his real and personal estate for her life, directing her to sell so much of the latter as would pay his debts, and made the following direction: "And I do further authorize my wife, after my death, to dispose of all the above said property to my heirs as she thinks best." The widow appointed to several of the heirs only five dollars each, to be paid by her grantees of parcels of the real estate. She deeded in fee-simple to one of the heirs, for the consideration of \$1,000 paid to her, twenty-three acres of the land. She deeded to another of the heirs, in fee-simple, forty-three acres of the

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land (reserving the use of it during her life), for the consideration of \$100, the taxes, expenses of her last sickness, an attendant to be provided her during life, funeral expenses, and a tombstone at her grave. *Held*, this was an attempt to make appointments of the fee of the land for her own benefit, not intended by the testator, was an abuse of the power conferred, and void.

ERROR to the District Court of Holmes county.

On the 1st day of December, 1873, Barnard Dewitt, a resident of Holmes county, died leaving a will by which he provided for the disposition of all his property in the following language:

"Item 1st. I give and devise to my beloved wife the farm we now reside on, situate in Knox township, Holmes county, Ohio, containing about one hundred and twenty acres, during her natural life-time, and all the stock, household goods, and chattels which may be thereon at the time of my decease, during her natural life as aforesaid, she, however, selling so much thereof as may be sufficient to pay my just debts. And do further authorize my wife, after my death, to dispose of all the above said property to my heirs as she thinks best."

He left surviving him his widow, Jane Dewitt, three sons, Charles, Henry, and Jackson, and one daughter, Margaret Gray; also grandchildren as follows: The five plaintiffs, Alonzo L. Dewitt, son of Milan Dewitt, deceased; Barnard, Boston, and Oliver Shank, sons of a deceased daughter; Elizabeth Shank, and George Zellers, son of the deceased daughter, Eliza Zellers; also Jennie, Dallas, Ida, and Calvin Zellers, children of Eliza Zellers, deceased.

On the 15th of December, 1873, the will was admitted to probate and the widow made her election to take under the will. She never qualified as executrix or testamentary trustee, nor were any letters of administration ever granted upon the estate.

Besides the farm, the testator left personal property considerably more than sufficient to pay the debts. The farm was worth \$6,600. The widow paid the debts out of the

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personal assets, and gave what remained of the personalty to Charles and Mrs. Gray.

On the 16th of February, 1877, for the consideration of \$1,000 to her paid, she executed to Henry a general warranty deed for some twenty-three acres of land left by the testator, and for the consideration of \$1,000, and on the 25th day of July, 1878, Henry executed a deed for the same twenty-three acres to the defendant, Jacob K. Lang, who has been in possession of the land ever since.

On the 2d day of March, 1878, the widow executed deeds for the remainder of the land to Charles, Jackson and Mrs. Gray; to Charles for forty-three acres, to Jackson for twenty, and Mrs. Gray for thirty acres. In her deed to Charles she reserved the use of the land during her life. Charles was to pay her one hundred dollars, the taxes, the expense of her last sickness, and funeral expenses. He was also to provide her with an attendant during her life, and to erect a tombstone on her grave.

In her deed to Jackson, she reserved the use of the land during her life. The consideration stated was thirty dollars, to be paid by Jackson to the heirs of Milan Dewitt and Mrs. Zellers—or five dollars each—six months after the death of the widow.

In her deed to Mrs. Gray, she reserved the use of the land during her life, with the privilege to Mrs. Gray to occupy and improve the land by paying the taxes and one-third of the products during the life of the widow. Mrs. Gray was also to pay the heirs of Mrs. Shank fifteen dollars—or five dollars each—six months after the death of the widow.

On the 20th day of August, 1878, Jackson Dewitt executed a deed for the twenty acres described in the widow's deed to Charles, and on the 25th day of March, 1878, Mrs. Gray also executed a deed for the thirty acres to Charles.

On the 15th day of August, 1878, the widow, Charles, and his wife, executed a deed for the thirty acres to the defendant, Weaver, and on the 5th day of February, 1881, Charles executed another deed to Weaver for twenty-three

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acres out of the lands described in his deeds from the widow and Jackson.

Weaver has been in possession of the lands described in his deeds since the dates of their execution, and Charles has been in possession of the lands described in the several deeds to him, except the thirty and twenty-three acres described in his deeds to Weaver.

The widow died January 1, 1879. The plaintiffs and the children of Mrs. Zellers have received nothing from the estate. On the 20th of January, 1882, the plaintiffs filed their amended petition, making all persons interested parties to the suit.

The plaintiffs set forth all the above facts and pray that the several deeds described be set aside except as to the undivided interest of Henry in the twenty acres deeded to Lang and the undivided interests of Charles and Mrs. Gray in the lands described in the deeds to Weaver; also for equitable partition; and further that Charles and Mrs. Gray be compelled to account and pay over to the plaintiffs their respective shares in the personal property and that Charles and the defendants, Weaver and Lang, be required to account for the rents and profits of the farm received since the death of the widow, and to pay over to the plaintiffs their shares of the same, and for general equitable relief.

The children of Mrs. Zellers by their guardian filed their answer and cross-petition setting up their respective interests in the estate and join with the plaintiffs in their prayer for relief.

To the petition as amended a general demurrer was filed by Charles and the defendants, Lang and Weaver. The demurrer was sustained and the plaintiffs not desiring to amend or plead further, the petition was dismissed. An appeal was taken and the case was again heard upon the demurrer of Charles and the defendants, Lang and Weaver. The demurrer was sustained and the petition again dismissed. For error in sustaining the demurrer and dismissing the petition, the plaintiffs now seek to reverse the judgment of the district court.

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W. J. Gilmore and Critchfield & Graham, for plaintiffs in error. .

Reed & Hoagland and B. S. Church, for defendants in error.

OWEN, C. J. The contention of the plaintiffs is that the appointments made by the widow are void. Several grounds are assigned for this claim. Among them, that (1) the power conferred by the will was one of distribution or disposition only, and not of selection and distribution; (2) that if there was a distribution among all the objects of the power, still the appointments to the plaintiffs were merely illusory and hence void; and (3) that the principal appointments made by the widow were for her own interest and benefit, and that while she may have acted upon an honest misconception of the power conferred upon her, its attempted execution was in legal effect an abuse, and in fraud, of the power actually conferred, and consequently void. An innocent motive will not save the exercise of a power if it violate the true purpose of the trust. *William's Appeal*, 73 Pa. St. 249. We deem it unprofitable to consider more than the one ground upon which we rest our determination of the case. After giving to his wife a life estate in all his property and directing a sale of sufficient to pay his debts, the testator uses the following words: "And I do further authorize my wife after my death to dispose of all the above said property to my heirs as she thinks best." It must be conceded that, subject to her own interest as a tenant for life, the widow was invested, at best, with but a power of appointment over the property which was the subject of disposition.

If in the attempted execution of the power conferred upon her she sought and obtained a substantial pecuniary benefit for herself, beyond, and not contemplated by, the manifest intention of the testator, the appointments fail as inoperative and void for want of power to make them.

"A person, having a power of appointment for the ben-
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efit of others, shall not, by any contrivance, use it for his own benefit." 1 Story's Eq. Jur., § 255.

In 2 Pomeroy's Eq. Jur., § 920, it is said that equity will regard an appointment as fraudulent "where the donee is restricted to a certain class of beneficiaries not including himself, and he intentionally makes an appointment for the purpose of his own benefit, and in such a manner as directly or indirectly to secure his own benefit."

"It is a principle well established that a father, having a power of appointment, can not derive a benefit to himself from the execution of it." Lord Chancellor Manners, in *Palmer v. Wheeler*, 2 Ball & Beatty, 29.

"A power can not be executed in favor of the donee of the power unless the instrument specially authorizes him to do so. The donee of a power can not execute it for any pecuniary gain, directly or indirectly, to himself." 2 Perry on Trusts, § 511; 1 *Ibid.*, § 254.

This principle finds strong support in the following cases: *McQueen v. Farquhar*, 11 Ves. 479; *Aleyn v. Belchier*, 1 Eden, 138; *Agassiz v. Squire*, 1 Jurist (N. S.) 50; *Bostick v. Winton*, 1 Sneed (Tenn.) 525; *Cruse v. McKee*, 2 Head (Tenn.) 1; *Holt v. Hogan*, 5 Jones Eq. (N. C.) 82.

In the case at bar the widow attempted to convey to Henry Dewitt in fee-simple, by warranty deed, twenty-three acres of the land left by the testator, for the consideration of \$1,000. She also attempted to convey to Charles Dewitt in fee-simple, by warranty deed, forty-three acres of the land for the consideration of \$100 to be paid to her, the taxes, expenses of her last sickness, an attendant during her life, funeral expenses, and a tombstone at her grave. She reserved the use of the land during her life.

The suggestion that the money and benefits received by her represented the stipulated value of her life interest in the property disposed of is conclusively answered by the averments of the petition, which are that they were the considerations, respectively, of the conveyance of the tracts of lands disposed of. Besides, it will be observed that her life estate is expressly reserved in the deed to Charles.

City of Cincinnati v. Anchor White Lead Co.

That her own personal, pecuniary benefit was in the contemplation of the parties to the transactions, seems too clear for discussion. We may well suppose that those heirs of the testator who were practically excluded from all benefits of the power conferred would have substantially shared in the disposition of the property but for these appointments made for her own benefit.

It was clearly the intention of the testator that his widow should not share in the estate beyond the life interest which the will bestowed upon her; and in seeking to derive a substantial benefit for herself from the estate which was intended to be appointed to the heirs of the testator, she exceeded and abused the power conferred. Upon the principle already declared but one result can follow the conclusion reached. The appointments attempted to be made by the widow are void. The claim made in behalf of the defendants, Lang and Weaver, that they are innocent, *bona fide* purchasers without notice, is not sustained by the most liberal construction, in their behalf, of the averments of the petition. The plaintiffs are entitled to the relief demanded.

The district court erred in sustaining the demurrer to the petition. The judgment of that court is reversed. The demurrer is overruled. The cause will be remanded to the circuit court for further proceedings.

CITY OF CINCINNATI v. ANCHOR WHITE LEAD CO.

CITY OF CINCINNATI v. WEWELL.

CITY OF CINCINNATI v. EGLESTON.

Assessment—Sewer—Use of sheeting without separate bid.

ERROR to the District Court of Hamilton county.

These were actions brought by the city of Cincinnati for the use of Frank Kirschner and A. Ashman, contractors, upon assessments made for the construction of a sewer in that city.

Wulsin & Worthington, for plaintiff in error.
James H. Perkins, for defendants in error.

BY THE COURT. The only finding of the trial court is "that by reason of the fact that the cost of the board sheeting was included in the amount assessed upon the property of the defendants, without any proposal or bid having been advertised or received for the said sheeting, said assessment upon the property of each of the defendants herein is invalid and void."

There was no judicial determination by that court of any other question or upon any other fact. Upon all other questions this court is appealed to as a court of first resort, not as a reviewing court. Upon no other issue is there any judgment before us for review.

From what is termed an "agreed statement of facts," it appears that all sheeting used to support the sides of the trenches which should be left in by the direction of the engineer, should be paid for at the rate of not more than one dollar per lineal foot of sewer. It was impossible to anticipate what amount of such sheeting it would be necessary to leave in. It is shown only that it was known to the officers and agents of the city that "some such sheeting" would be necessary to be left in. Intelligent estimates and bids were impossible. It further appears that the sheeting which was left in "was necessary in the construction of said work." No fraud is complained of. No complaint is made that the work of construction was not well done. The facts so agreed upon bring this question within the rule declared in *Hastings v. Columbus*, 42 Ohio St. 585.

It follows that there was error in adjudging the entire assessment to be void, for the reason that it included the cost of the board sheeting.

There is no agreed statement of the facts of the case. That which is incorporated in the bill of exceptions and termed such is in great part simply an agreement as to the evidence relative to certain facts, and from which, in connection with other evidence in the bill of exceptions, the

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substantive facts were to be found by the court. It is not found nor agreed, nor does it appear, that there was no jurisdiction to proceed with the improvement. The judgments of the courts below will therefore be reversed, and the cause remanded for further proceedings.

DUFFY v. MEYERS.*Section 455 Revised Statutes—Reference—Issues of fact.*

1. Prior to the amendment of section 455 Revised Statutes, passed April 18, 1883 (80 Ohio L. 169), by virtue of which the district court was expressly required to find the facts upon the reservation of a cause to this court, only important and difficult questions of law were authorized to be reserved for disposition here, and such reservation was unauthorized until the issues of fact were determined in the district court, or other court below.
2. This cause was referred by the district court to a referee "to hear and determine all the issues of fact in the cause." Upon the coming in of his report, with the testimony, the plaintiffs moved for judgment thereon, while the defendants concurrently moved to set aside the report upon the alleged ground that it was against the weight of the evidence. Without passing upon these motions, the court reserved the cause for disposition here. *Held*, as such order of reservation would, if authorized, call upon this court first to dispose of these motions, and thereby weigh the evidence, and determine the issues of fact, it was without authority.

RESERVED in the District Court of Hamilton county.

Healy & Brannan, for plaintiffs.

Burnet & Burnet, E. A. Guthrie, and D. W. Huntington, for defendants.

BY THE COURT. This cause was appealed from the court of common pleas to the district court, by which it was referred to a referee "to hear and determine all the issues of fact in the cause," and report his findings and testimony.

Upon the coming in of his report, which, with the testimony, occupies several hundred pages of the printed record,

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the plaintiffs moved the court for judgment thereon. At the same time the defendants moved the court to set aside the report upon the alleged ground that it was against the weight of the evidence. Without passing upon either motion, the district court made the following order :

“This day came the parties and submitted this cause to the court for decision, on consideration whereof, it appearing to the court that difficult and important questions arise and are involved in said cause, on motion of the plaintiffs thereto, none of the defendants objecting, it is ordered that said cause be and the same is hereby reserved to the supreme court for decision.” This order was entered prior to the amendment of section 455 Revised Statutes, passed April 18, 1883 (80 Ohio L. 169), expressly requiring the district court to find the facts, upon the reservation of a cause to this court.

The evident purpose of the order of reservation was to invoke the action of this court, as a preliminary question upon these motions so left undisposed of by the district court. This necessarily involved the determination of the question whether the evidence taken by the referee sustains his conclusions of fact.

The action of this court can not be thus invoked, upon issues of fact, as a court of first resort or trial court.

Only important and difficult questions of law are authorized to be reserved for disposition here. *Hubble v. Renick*, 1 Ohio St. 171; *Wilson v. Hamilton*, 4 Ohio St. 722; *Ogborn v. Taylor*, 6 Ohio St. 199; unreported case of *Richmond v. Richland Furnace Co.*, in this court, January term, 1883. Not until the issues of fact are settled below is this court empowered to entertain a case upon reservation. The cause will be remanded to the circuit court for further proceedings.

The State *ex rel.* Attorney-General v. Anderson.

THE STATE *ex rel.* ATTORNEY-GENERAL v. ANDERSON.

Constitutional law—Act of March, 26, 1886—Local and special act.

The act of March 26, 1886, supplementary to section 1707 of the Revised Statutes (83 Ohio L. 43), is invalid, for the reason that the act is special and not general, inasmuch as the powers there conferred on cities having at the last federal census a population of 16,512, and no more, simply designates the city of Akron, and does not create a class, as Akron was the only city at that census having that population; and as the act confers corporate powers, it is in violation of section 1, article 13, of the constitution.

J. A. Kohler, attorney-general, for plaintiff.

D. A. Doyle and L. D. Watters, contra.

QUO WARRANTO.

BY THE COURT. On the 26th of March, 1886, an act was passed by the general assembly creating the office of police judge in all cities of the second grade and third class having a population at the last federal census of 16,512, and no more, to be chosen by the electors of such cities. It was passed as supplementary to section 1707 Revised Statutes, and is designated as section 1707b. (83 Ohio L. 43).

Under the provisions of this act the respondent was elected to the office of police judge in the city of Akron at the last spring election, has qualified, entered upon, and is claiming the right to, and is exercising the powers so conferred on him by this act; and from which it is asked that he be ousted by the judgment of this court, on the grounds (1) that the act is a special one conferring corporate powers, and (2) that it provides for the establishment of a court—that of a police judge in the city of Akron—without the requisite concurrence of two-thirds of the members elected to each house of the general assembly, in contravention of article 13, section 1, and article 4, section 13, respectively, of the constitution of the state.

The city of Akron is the only one in the state that, at

44s	947
47	96
44s	947
48	218
44	947
55	11

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the last federal census, had a population of 16,512 and no more.

The case is presented to the court upon a demurrer to the petition, presenting the facts above stated.

Whether the power of the general assembly to create a police court, and to provide for the election of a judge therefor, is limited by section 18, article 4, of the constitution, or is conferred without such limitation by section 6, article 18, of that instrument, it is not necessary to consider; for it is clear that the act in question is a special one conferring upon the city of Akron, and it alone, certain corporate powers, that is to say, the power through its electors to choose a police judge, and, through its mayor and council to appoint a prosecuting attorney and clerk of the court of such judge. It is admitted that Akron is the only city in the state that at the last federal census had a population of 16,512 and no more; and as the application of this statute is, by its terms, confined to such cities as at the last federal census had this exact population and no more, it as certainly designates the city of Akron, on which these powers are to be conferred, as if it had been described by name. The statute is not to apply to any cities that may at any time hereafter have the population named; it applies only to such as had this precise population at the last federal census; and thereby, instead of classifying the city of Akron, it is taken from the class to which it belongs, under the general statute classifying the cities of the state (sec. 1548 Revised Statutes), and clothed with certain corporate powers not possessed by any city of its class.

Judgment of ouster.

The State *ex rel.* Pugh, Prosecuting Attorney, v. Brewster, Auditor.

THE STATE *ex rel.* PUGH, PROSECUTING ATTORNEY v. BREWSTER, AUDITOR.

44* 949
44* 538

Section 1298, Revised Statutes—Prosecuting attorney—Commissions on costs.

Section 1298, Revised Statutes, entitling a prosecuting attorney to a commission of ten per cent on all costs collected in criminal causes, embraces the costs collected by him of the defendant, in performance of the duty required of him by section 1273, and does not include the costs received from the state and paid to the order of the clerk of the court of common pleas, under the provisions of sections 7336 and 7337 of the Revised Statutes.

MANDAMUS.

M. A. Dougherty, Isaiah Pillars, M. F. Wilson, Bentley Matthews, I. N. Alexander and William H. Pugh, for relator.
Rufus B. Smith and William H. Taft, for defendant.

MINSHALL, J. The relator, the prosecuting attorney of Hamilton county, claims that he is entitled to a commission of ten per cent on all costs paid by the state on the warrant of the auditor of state to the order of the clerk of the court of common pleas, under the provisions of sections 7336 and 7337, Revised Statutes. This claim is based upon the language employed in section 1298, Revised Statutes, which reads as follows:

“SEC. 1298. In addition to his salary, the prosecuting attorney is entitled to ten per cent on all moneys collected on fines, forfeited recognizances, and costs in criminal causes, provided that such commission shall not in any case exceed one hundred dollars.”

Section 7336 provides that when the clerk makes the proper certificate as to the non-collection of the costs on execution, adjudged against a defendant upon his conviction and sentence to the penitentiary of the state, “the warden shall allow so much of the cost-bill and charges for transportation as he finds correct, and certify such allow-

The State ex rel. Pugh, Prosecuting Attorney, v. Brewster, Auditor.

ance, which shall be paid by the state;" and the next section provides, that it is to be paid, upon the allowance of the auditor of state, "to the order of the clerk."

The auditor of the county, having refused to draw a warrant on the treasurer of the county in favor of the relator, for his commission upon costs so paid by the state in certain criminal cases, the same not having been collected of the defendants by execution or otherwise, asks that he may be compelled in this proceeding to do so by the peremptory order of this court.

The question arises upon the proper construction of the language, "on all moneys collected . . . on costs in criminal causes," used in section 1298. Does the language embrace costs paid by the state to the order of the clerk under the sections above referred to, or is it confined to such costs as the prosecuting attorney collects of defendants in criminal causes, in performance of the duty imposed on him by section 1273, Revised Statutes? We have no hesitation in saying that the above language does not embrace the former and is confined to the latter.

In the enactment of a statute, we must suppose, that the legislative mind is directed to what has been enacted, and exists, as a part of the statutory law of the state on the same subject or related to it. Without this there would be neither system nor harmony in the statutes, and their construction would, in most cases, be a mere matter of arbitrary guessing.

Now, looking outside of section 1298 to other sections of the Revised Statutes, more or less related to it in subject-matter, we find that by section 7183 it is made the duty of the prosecuting attorney to prosecute and recover the penalty of all recognizances by him received; and, by section 1273, to prosecute on behalf of the state all complaints, and in every case of conviction to "forthwith cause execution to be issued for the fines and costs, or costs only, as the case may be, and faithfully urge the collection until it is effected;" and "forthwith pay over to the county treasurer all moneys belonging to the state or

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county which come into his possession for fines, forfeitures, costs, or otherwise."

Now we think it is manifest that the mind of the legislature was directed to the provisions of these several sections when it enacted section 1298, and that the commission there allowed on all moneys collected on fines, forfeited recognizances, and costs in criminal causes, has reference to such fines, forfeited recognizances, and costs in criminal causes as, by these sections, he is required to collect. That this is so with respect to fines and forfeited recognizances is beyond question, and this fact, of itself, supplies an argument that the same is true as to costs collected in criminal causes. It is hardly to be supposed that the allowance of a commission on moneys collected by a prosecuting attorney in the performance of a duty required of him by statute would be associated with the allowance of a percentage on moneys neither collected nor required to be collected by him; and it is fair to conclude that the costs collected, on which a commission is allowed him in section 1298, simply embraces costs collected by him of defendants in criminal causes under section 1273. The commission is allowed as a compensation in addition to his salary; compensation is a reward for services; hence, the commissions here allowed should be referred to, and embrace collections made by the prosecuting attorney in the performance of his duty, and not to moneys received or collected by others, the receipt and collection of which is no part of his duties as an officer.

Again, it is a misuse of terms to say that the costs paid by the state to the order of the clerk, under sections 7336 and 7337, are costs collected of the state in criminal causes. They were not taxed against the state; on the contrary, they were taxed in favor of the state and against the defendant upon his conviction and sentence to the penitentiary. In *Fitzpatrick v. Flagg*, 5 Abb. Prac. Rep. 213, it was held, that a tax can not be regarded as "collected" until it is paid by those on whose property it has been levied. Costs so paid are, properly speaking, advancements made by the state to be returned to it, should they afterward be collected

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from the defendant or his property. This is apparent from section 1327, Revised Statutes, where the costs so paid by the state are designated as costs "which the state is by law required to *advance* in criminal causes."

Again, the construction claimed by the relator would be inconsistent with sound policy. It would unwisely remove the motive prosecuting attorneys would otherwise have in collecting costs of defendants in criminal causes; unless we adopt the more absurd position, that they are to receive the commission on the money advanced by the state, and also on the costs, if afterward collected of the defendant. We can not ascribe such a want of wisdom to the legislature.

Prior to the revision of 1880 the statute on this subject, first adopted in 1865, and afterward repealed and re-enacted without any material change in 1873, expressly limited the costs on which a percentage was allowed prosecuting attorneys to "costs collected of defendants in criminal causes." (62 Ohio L. 183; 70 Ohio L. 67.)

It is claimed by counsel for the relator that the change made in 1880 is a substantial one, and, of itself, indicates that the construction claimed for the relator is the correct one. Much reliance is placed upon *United States v. Bowen*, 100 U. S. 508. But this case rather supports than militates against the construction we place upon the statute before us. It is there said that "when there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information;" to which is added, "when the meaning is plain, the courts can not look to the statutes which have been revised to see if congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of congress." To make the rule stated in that case applicable to this one, the construction claimed should be the plain meaning of the language employed in the revision; otherwise resort may be had to the old law for the purpose of removing a substantive doubt as to the meaning of the language employed in the revision. So

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that the rule stated in the above case does not materially differ from the rule adopted by the decisions in this state for the construction of revised statutes. *Ash v. Ash*, 9 Ohio St. 387, and *Allen v. Russell*, 39 Ohio St. 336.

But, as has been already shown, the meaning of the language employed in the Revised Statutes is plain and confines the commissions there allowed to prosecuting attorneys, on costs collected in criminal causes, to costs collected of the defendant in such causes. But if there were a substantive doubt as to this, a reference to the old law, which the decisions in such case permit, would at once remove it and show that the construction reached from a consideration of the language employed in the statute itself is the correct one.

The omission in the revision of the language "collected of defendants," found in the old statute, may easily be accounted for on the ground that it was not regarded as necessary to the clear expression of the legislative intent; and was, therefore, omitted for the purpose of brevity. Such an omission would have been entirely consistent with the purpose for which the commission to revise and consolidate the statutes was created; and, in all probability, is the reason that the omission was made.

Writ refused.

OWEN, C. J., dissents.

MEISS v. GILL.*Estoppel—Pleading—Evidence.*

When a party claims a former adjudication of matter set up in an action to be an estoppel, such judgment should be pleaded; and where the same is not pleaded when it can be, it is not evidence conclusive of an estoppel, and testimony may be given to show the truth.

ERROR to the District Court of Pickaway county.

July 9, 1881, Fistel Meiss brought suit in the court of common pleas of Pickaway county against William Gill

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and I. V. Cushing on a promissory note, of which the following is a copy, with the indorsements and credits thereon:

“\$800.00. CINCINNATI, *January 21, 1876.*

Four years after date I promise to pay to the order of Lucy Gill, three hundred dollars, with interest at six per cent per annum.

Value received (with interest at ten per cent per annum after maturity). MICHAEL IHLE.”

The following indorsements are found upon the note:

“Pay to order of I. V. Cushing.

LUCY GILL. WILLIAM GILL.”

“Pay to the order of Fistel Meiss.

I. V. CUSHING.”

“Credit, April 10, 1880, balance of purchase-money of real estate sold in case of *Fistel Meiss v. Michael Ihle*, in Clermont common pleas, \$148.49.”

There are no other credits or payments on the note.

In his petition Meiss averred that at the time of executing the note William Gill, I. V. Cushing, and Lucy Gill signed the note respectively on the back thereof; that all of said names were so placed on the note at the time of its execution, for the purpose of giving further security without in any way prescribing the limits of the liability, and before the note was delivered, and that the defendants are liable on the note as joint and several makers.

The plaintiff further states that at the time of making and executing the note Lucy Gill, William Gill, and I. V. Cushing placed their names on the back of the note as joint and several makers, with the words, “pay to the order of I. V. Cushing” and “pay to the order of Fistel Meiss;” and that the note was made payable to the plaintiff as the original payee. And that Lucy Gill, at the time of the execution of the note, was the wife of William Gill.

Summons was served upon William Gill, but Cushing was not found.

No demand of payment had been made and no notice of

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non-payment had been given, and Gill was not then liable as indorser of the note.

In his answer Gill denied that at the *time of executing* the note either he or Cushing or Lucy Gill signed the note on the back thereof, and he denied that he signed the note as maker or placed his name on the back of the same before the note was delivered, and he denied that he was liable as a joint and several maker, and he denied that Meiss was the original payee of the note; and he averred that he, Gill, signed the note as indorser only.

No reply was filed, and no claim of estoppel or former judgment was pleaded.

On the trial a jury was waived and the cause was submitted to the court, and Meiss offered in evidence the note, "subject to exceptions and objections for incompetency and irrelevancy," and he read the record of a suit in the court of common pleas of Clermont county, Ohio. This was a record of a suit by Meiss against Michael Ihle, Lucy Gill, William Gill, and J. V. Cushing, to foreclose a mortgage executed by Ihle to Cushing to secure the payment of this note and three other like notes.

In the case presented by the record Meiss averred in the petition that Lucy Gill, William Gill, and Cushing signed the notes as makers, and that they were liable on the notes as joint makers. At the time of filing the petition this note and two other notes were not due. That petition demanded a personal judgment against Gill and wife and Cushing for the note due, and asked for sale of mortgaged premises. No answer was filed, and a personal judgment was formally rendered against the defendants on the notes first due (another note having become due), but not on this note.

The mortgaged premises were sold, and the proceeds paid the costs and the judgment rendered, and \$148.49 on this note, April 10, 1880. Meiss also gave in evidence a deposition of himself and another.

On the trial, against the objection of Meiss, William Gill testified in his own behalf, and stated what he claimed to

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be the facts as to the execution of the notes and the subsequent indorsement of the same, and testified that he did not sign the note as maker, but signed the same as indorser only.

Meiss claimed the record to be conclusive evidence, and he excepted to the testimony of William Gill, "on the ground that the same was not competent to contradict the record offered in evidence by the plaintiff." The court overruled the objection and admitted the testimony. The court found in favor of Gill, and rendered judgment for his costs. A motion for a new trial was overruled, and a bill of exceptions was filed. On proceedings in error the district court affirmed the judgment of the court of common pleas, and plaintiff in error now seeks a reversal of those judgments.

Page, Abernethy & Folsom, for plaintiff in error.

The proceedings in the court of common pleas of Clermont county estop William Gill from denying that he executed the note as maker. *Beloit v. Morgan*, 7 Wall. 619; *Gardner v. Buckbee*, 8 Cow. 120; *Bouchaud v. Dias*, 3 Denio, 238; *Doty v. Brown*, 4 N. Y. 71; *Babcock v. Camp*, 12 Ohio St. 11; *Ferrer's Case*, 6 Coke, 8; *French v. Campbell*, 2 W. Black. 163; *Duchess of Kingston's Case*, 2 Sm. Lead. Cas. 799; *Birckhead v. Brown*, 5 Sandf. 135; *Aurora v. West*, 7 Wall. 82; *Mayor v. Lord*, 9 Wall. 409; *Gould v. Evansville, etc., R. R. Co.*, 91 U. S. 533; *Hites v. Irvine*, 13 Ohio St. 284; *Covington, etc., Bridge Co. v. Sargent*, 27 Ohio St. 233; *Petersine v. Thomas*, 28 Ohio St. 596; *Grant v. Ramsey*, 7 Ohio St. 163; *Freem. Judgments*, section 253.

The fact that the judgment was by default can make no difference. *Freem. Judgments*, sections 330, 331; *Newton v. Hook*, 48 N. Y. 676; *Greenabaum v. Elliott*, 60 Mo. 25.

A judgment by default is a judgment by confession. In this country a judgment by consent or by confession constitutes *res adjudicata*. *Chamberlain v. Preble*, 11 Allen, 370; *Brown v. Sprague*, 5 Denio, 545; *Fletcher v. Holmes*, 25 Ind. 458; *Bank v. Hopkins*, 2 Dana, 395; *Dunn v. Pipes*, 20 La.

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Ann. 276: *Neusbaum v. Keim*, 24 N. Y. 325; *Sheldon v. Stryker*, 34 Barb. 116; *Dean v. Thatcher*, 32 N. J. Law, 476.

P. C. Smith and Milt Morris, for defendant in error.

An estoppel must be pleaded to be available. *Fanning v. Insurance Co.*, 37 Ohio St. 344; *Howard v. Mitchell*, 14 Mass. 241, 243; *Kemp v. Goodal*, 1 Salk. 277; *Jones v. Reynolds*, 7 Car. & P. 335; *Picquet v. McKay*, 2 Blackf. 465; *Outram v. Moorewood*, 3 East, 346; *Vooght v. Winch*, 2 Barn. & Ald. 662; *Aurora v. West*, 7 Wall. 82; *Isaacs v. Clark*, 12 Vt. 692; *Eastman v. Cooper*, 15 Pick. 276; 2 Sm. Lead. Cas. 668.

To estop an indorser, under the circumstances in this case, from asserting the fact that he is an indorser, and not a maker, it must appear that in the former case the point was at issue, material, and necessarily determined in the action. *Railroad Co. v. Ralston*, 41 Ohio St. 587.

A former judgment is a bar, not to all claims that might have been litigated therein, but only to such claims or matters as might have been litigated under the pleadings and issues as made. *Millard v. Missouri, K. & T. R. Co.*, 86 N. Y. 443; *Bates v. Stanton*, 1 Duer, 79; *Burdick v. Post*, 12 Barb. 168; *Carter v. James*, 13 M. & W. 137; *Lewis' App.*, 67 Pa. St. 153; *Aspden v. Nixon*, 4 How. 497; *Eastman v. Cooper*, 15 Pick. 276.

A default judgment is not a bar. *Cromwell v. County of Sac*, 94 U. S. 851; *Boileau v. Rutlin*, 2 Exch. 665, 681; *Hughes v. Alexander*, 5 Duer, 493; *Howlett v. Tarte*, 10 C. B. N. S. 813; *Lumber Co. v. Buchtel*, 101 U. S. 638; *Davis v. Brown*, 94 U. S. 423; *McClelland v. Bishop*, 42 Ohio St. 113.

The estoppel must operate mutually between the parties. Both must be bound or neither is estopped. One who is not bound by, can not take advantage of an estoppel. *Lewis v. Castleman*, 27 Tex. 421; *Bolling v. Mayor*, 3 Rand. (Va.) 563; *Schuman v. Garratt*, 16 Cal. 100; *Lansing v. Montgomery*, 2 John. 382; *Longwell v. Bentley*, 23 Pa. St. 99; *McClelland v. Bishop*, *supra*.

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Gill had a right to rely on the information conveyed by the indorsement that nothing was claimed beyond the amount due on the first of the series of notes. *Finckh v. Evers*, 25 Ohio St. 82; *Hamilton v. Miller*, 31 Ohio St. 87.

FOLLETT, J. It does not appear that either party objected to the form or substance of the pleadings. The only exceptions noted were to the reading of the record "as incompetent and irrelevant," and to the admission of the testimony of Gill, and the objection to such admission was "on the ground that the same was not competent to contradict the record offered in evidence by the plaintiff." The record was not in issue, and no former adjudication of the same matter was set up as an estoppel. Meiss claimed a personal judgment for the unpaid amount of the promissory note in suit against Gill as a joint maker of the note. Gill answered, denying that he was a joint maker of the note, and averring "that he signed said note as indorser only." To this averment Meiss could have replied as an estoppel any former adjudication between them of that fact.

This court has decided that question, and also has held: "If the plaintiff relies on a record of a former adjudication of the same matter set up in an answer, as an estoppel, he should plead such former judgment." *Fanning v. Insurance Co.*, 37 Ohio St. 344. And in that case the court held: "It (the record) is not admissible in evidence under a general or special denial of the new matter contained in the answer." The record is not admissible in evidence as *conclusive* of the truth of the facts put in issue, nor as an estoppel.

This court said, in *Lockwood v. Wildman*, 13 Ohio, 450: "A former decree to be a bar, even when well pleaded, or set up by way of answer, must be such as shows that the rights of complainants, now set up, have been already conclusively determined." And this court held, in *Grant v. Ramsey*, 7 Ohio St. 157: "Where a question of fact has once been tried and adjudicated by a court of competent

jurisdiction, it can not be re-opened in a subsequent suit between the same parties. They are concluded by the former judgment." But such trial and adjudication should be pleaded, if the same can be pleaded, to conclude the parties. When a judgment is pleaded in bar, there must be determined whether or not the fact set up has been thus adjudicated between the parties. *Lockwood v. Wildman*, *supra*, and *Gilbert v. Thompson*, 9 Cush. 348, and *Davis v. Brown*, 94 U. S. 423. And when a judgment is not pleaded, and could have been pleaded, "in evidence," such a judgment is not conclusive to estop a party from proving the truth of a fact in dispute. To this extent the rule laid down in the case of the *Duchess of Kingston*, 20 Howell's State Trials, 355, has been modified.

In the year 1819, the Court of King's Bench, in *Vooght v. Winch*, 2 Barn. & Ald. 662, held: "A verdict obtained by the defendant in a former action, and which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against the plaintiff, but only evidence to go to the jury."

And Abbott, C. J., said, on page 668: "I am of opinion that the verdict and judgment obtained for the defendant in the former action was not conclusive evidence against the plaintiff upon the plea of not guilty. . . . But the defendant has pleaded not guilty, and has thereby elected to submit his case to a jury, . . . and they are to give their verdict upon the whole evidence then submitted to them; . . . for the very first thing I learnt in the study of the law was that a judgment recovered must be pleaded." The other judges, in separate opinions, concurred. See also *Jones v. Reynolds*, 7 Car. & P. 335.

In *Howard v. Mitchell*, 14 Mass. 241, the court held: "When the matter, to which the estoppel applies, is distinctly averred or denied by one party, and the other takes issue on the fact, instead of pleading the estoppel, he waives the estoppel, and the jury are at liberty to find the truth." See *Eastman v. Cooper*, 15 Pick. 276.

In *Picquet v. McKay*, 2 Blackf. 465, the supreme court

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of Indiana held: "To render a former recovery an estoppel to a subsequent suit, embracing the same matter in controversy with the first, the judgment must be specially pleaded as an estoppel. If it be not so pleaded, and the defendant rely on the general issue, the former judgment is admissible in evidence, but it is not a conclusive bar to the action; the jury may still find for the plaintiff, if they think him entitled to recover."

We need not consider the effect of a judgment on default, nor whether that record presented an adjudication of any matter that would have been a bar to any defense set up by Gill if the judgment had been well pleaded.

Each case must be determined by its special facts explained by legal principles. See *Davis v. Brown*, 94 U. S. 428.

On the trial of this original case the issue between Meiss and Gill on the pleadings was, whether or not Gill signed that note as a maker. On that issue he was a competent witness to testify in his own behalf.

And as the court allowed the record of the former case to be read as testimony, it was not error to permit Gill to testify as to the execution of the notes and mortgage and how he came to sign his name on the back of this note.

The court did not err to the prejudice of the plaintiff in error.

Judgment affirmed.

ANDERSON v. SHARP.

Mortgage—Foreclosure—Sale—Application of proceeds.

K. executed and delivered to T. three notes, payable to T.'s order, due in one, two, and three years from date, and a mortgage to secure their payment. Before either note became due T. indorsed the notes, waiving demand and notice, and delivered both to A., with an assignment of the mortgage. The note maturing in one year not being paid when due was put in judgment against K. as maker and T. as indorser. K. being insolvent, T. paid the judgment. He then commenced suit to foreclose the mortgage, claiming the benefit of the mortgage security

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and a lien prior to the lien of A., who held the remaining two notes, which were then past due. A., by answer and cross-petition, alleged facts showing T.'s liability as indorser upon the two notes, that K. was insolvent, that the lands would prove insufficient to satisfy the whole mortgage debt, claiming priority of lien, praying foreclosure and full relief. Later, S., on his motion, became plaintiff and filed supplemental petition averring purchase from T., and assignment of all his rights and interest in the mortgage and as plaintiff in the suit, and claiming priority of lien. The land was sold. The sum realized was not sufficient to satisfy the whole indebtedness. *Held*, that A. was entitled to payment in full from the proceeds before application of the money to the claim of S.

ERROR to the District Court of Franklin county.

F. W. Wood, for plaintiff in error.

It may be conceded that when Thompson paid Anderson the amount of the judgment obtained on the first note he became thereby re-invested with an interest in the mortgage securing payment of the three notes; and that Sharp, by his purchase from Thompson, acquired all the interest held by Thompson in the mortgage security at the time he sold to Sharp. But the interest so purchased by Sharp is subject to all the equities in favor of Anderson that existed against Thompson. *Bennet v. Williams*, 5 Ohio, 461; *Decamp v. Gaskill*, 1 C. S. C. R. 337; *Walker v. Dement*, 42 Ill. 272; Rev. Stat., sec. 4993; 18 Ohio St. 546; 25 Ohio St. 652; Jones Mort., secs. 822, 1701; 9 Vt. 299; 30 La. Ann. 618; 6 Gray, 564; 9 Wend. 410; Hopk. Ch. (N. Y.) 569.

It may further be conceded to be the well settled law in this state that where a mortgage has been given to secure several notes falling due at different times that the note first due is entitled to preference, and the fund arising on sale shall be applied to the satisfaction of the notes in the order in which they fall due. *Bank of U. S. v. Covert*, 13 Ohio, 240; *Bushfield v. Meyer*, 10 Ohio St. 334; *Kyle v. Thompson*, 11 Ohio St. 616; *Schwartz v. Liest*, 13 Ohio St. 419; *Fithian v. Corwin*, 17 Ohio St. 119; *Beresford v. Ward*, 1 Dis. 169.

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And the same rule obtains where the notes have been transferred to several persons. *Winters v. Franklin Bank*, 33 Ohio St. 250.

Thompson, by his indorsement, undertook, in effect, to make good any deficiency, and in case of insolvency of the maker and insufficiency of the mortgage security, to pay the same. To compel Anderson to bring a personal action on the indorsement on the note last due against Thompson would lead to circuitry of action and is against the spirit and reason of the code. Thompson's indorsement was simply an additional security, and Anderson had the right to pursue either or both securities until he obtained payment.

The utmost that Thompson could claim was that he should be regarded as having an interest in the mortgage similar to that of a junior mortgagee. *Fihian v. Corwin*, *supra*.

The following cases will be found to bear upon the question: *Bank of England v. Tarterton*, 23 Miss. 173; *Saltzman v. Creditors*, 2 Rob. (La.), 241; *Donley v. Hays*, 17 Serg. & Rawle, 400; *Hancock's App.*, 34 Pa. St. 155; *Perry's App.*, 22 Pa. St. 43; *Cullum v. Erwin*, 4 Ala. 452; *Bryant v. Damon*, 6 Gray, 564; *Mechanics' Bank v. Bank of Niagara*, 9 Wend. 410; *Van Rensselaer v. Stafford*, Hopk. Ch. 569; *Waterman v. Hunt*, 2 R. I. 298; *Givathmey v. Ragland*, 1 Rand. (Va.), 466; *M'Vay v. Bloodgood*, 9 Porter (Ala.), 547; *Ewing v. Arthur*, 1 Humph. (Tenn.), 537.

James E. Wright and Walter B. Page, for defendant in error.

The rule in this state is that promissory notes, secured by mortgage, falling due at different dates are, on sale of the mortgaged premises, to be paid in the order in which they become due. *Winters v. Bank*, 33 Ohio St. 250.

"The several notes being equivalent to so many successive mortgages." *Jones Mort.*, secs. 1699, 1700.

Sharp, in purchasing the first note from Thompson, had a right to rely upon its priority.

The objection that to force Anderson to his action against Thompson upon his indorsement of the last note would lead to circuity of action might be tenable if Thompson was the party seeking payment of the money to him.

We do not think that a simple indorsement which was necessary to clothe Anderson with the legal title to these notes amounts to a warranty that the security was adequate to meet these notes. It is a personal contract at large and not a pledge of any particular fund. If the indorsee is not fully paid he has his personal remedy against the indorser, and this, in the case at bar, has been asserted, for Thompson has been compelled to make the first note good by payment, and when he did pay it had a right to it; and he stood precisely, after payment of it, to Anderson, as if he had never parted with the note; and he had a right then to transfer and assign it to any one he pleased, if he could have had any such right in case he had never sold it to Anderson, but had kept the note himself. *Donley v. Hays*, 17 Serg. & Rawle, 400; *Perry's App.*, 22 Pa. St. 48; *Massie v. Sharpe*, 13 Iowa, 542; *Ewing v. Arthur*, 1 Humph. 537; *Wood v. Trask*, 7 Wis. 566.

The effect of the indorsement was to carry all its accessories with it by implication of law, as the mortgage given to secure the payment, but it did nothing more, by the common law, and the assignment of a judgment upon a note secured by mortgage has the like effect. *Bolen v. Crosby*, 49 N. Y. 183; *Funk v. McReynolds*, 33 Ill. 182.

And the same effect will be given to an assignment of only a part of such judgment. It will carry a proportionate interest in the mortgage, *Pattison v. Hull*, 9 Cow. 747.

SPEAR, J. The original action was one to determine, as between defendant in error, Abram Sharp, and plaintiff in error, James H. Anderson, which had the prior lien on certain lands, and the right to first payment from proceeds of sale. The court of common pleas found in favor of Anderson and decreed distribution accordingly. On error the district court found in favor of Sharp and reversed the de-

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creed of the common pleas. To obtain a reversal of this judgment and decree the present proceeding in error is prosecuted. The facts are sufficiently indicated in the syllabus.

The court of common pleas was clearly right in finding in favor of Anderson, and ordering that he should be paid in full, and that only the balance should be paid to Sharp. Sharp stood, to all intents and purposes, in the place of Thompson. Upon familiar principles he could have no higher rights in any respect than Thompson had. He could not, by substituting himself as plaintiff, deprive Anderson of any right he had against Thompson at the time of the substitution, nor was the power of the court to render any decree which might have been rendered against Thompson and necessary for the full protection of Anderson thereby in the least abridged or impaired. The suit was one which under the pleadings not only authorized the court to order a foreclosure of the mortgage, but as well to find that Thompson was indebted to Anderson upon the two notes; and, if necessary in order to give full relief to Anderson, to render a judgment in his favor and against Thompson for any balance that might remain due after application of purchase-money upon Anderson's decree. Indeed, Thompson had not been dismissed from the case, and as regards the rights of Anderson, upon the allegations of his cross-petition, if it were necessary to keep him in court, Thompson was still a party. True, as plaintiff he had been succeeded by Sharp. This relieved him of further responsibility as to costs of prosecution, but did not send him out of court. The court, therefore, upon any aspect, having before it the proper parties, and having jurisdiction of the subject-matter, could by one judgment and order dispose of all the claims arising upon the pleadings and do full and exact justice to all the parties.

It is contended that, inasmuch as Sharp's claim grew out of payment of the first note by Thompson, Sharp was entitled to a decree finding his lien prior to that of Anderson, and to order of distribution accordingly. Suppose

Sharp's lien were found to be first, how would that help the him upon the record here presented? It has already been found that for all purposes of the case Sharp was Thompson; so that whatever might be accorded to Thompson might be accorded to Sharp, and whatever might be refused to Thompson might be refused to Sharp. If Sharp's lien were found to be first an order to pay him in full from the proceeds would, *pro tanto*, reduce the amount going to Anderson. Then, Anderson being entitled to a finding and judgment against Thompson, why should Sharp have money which the court having under its control had the power to award to Anderson in satisfaction of his claim against Thompson? In other words, Sharp being Thompson, should the court, after making the order in favor of Sharp and finding the amount due Anderson from Thompson, and after rendering a judgment therefor in favor of Anderson and against Thompson, refuse to order the amount going to Sharp to be paid to Anderson, but pay it over to Sharp and remit Anderson to his collection by process of execution? Surely such a round-about way would favor circuity of action rather than discourage it.

The effect of the judgment of the common pleas was to settle the entire litigation in one proceeding, and in so doing the court was, to use the language of this court in *Morgan v Spangler*, 20 Ohio St. 54, "but carrying out the spirit and intention of the code of civil procedure, a leading object of which seems to be the avoidance of circuity and multiplicity of suits."

Whether the position of Thompson upon paying off the judgment obtained upon the first note was that of a junior mortgagee as to the amount so paid, or whether he became subrogated to the rights of Anderson in such sort as to be in a position to claim a first lien on the mortgaged property, it is not proposed here to consider. The question is ably argued by the counsel in their respective briefs. But, inasmuch as the views of the members of the court are not in entire harmony upon the question, and inas-

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much as in the opinion of the writer a determination of it is not necessary to a proper disposal of the case, and believing that, under the circumstances, it is sufficient to discuss and determine only the phases of the case which are indispensable to a disposition of it, the writer refrains from entering upon such discussion.

The judgment of the district court is reversed, and that of the common pleas affirmed.

MINSHALL, J. We fully concur in the opinion that the judgment of the district court should be reversed and that of the common pleas affirmed; and we as fully concur in the opinion that Sharp stands in the shoes of Thompson, to whose rights he has succeeded since the commencement of the suit by Thompson; for nothing can be better settled than that one who buys into a lawsuit must abide by the case of the one from whom he purchases.

We think, however, that the decision should be placed, not upon the ground that there is any circuitry of action to be avoided, but upon the ground that as against Anderson, Thompson has no right to any part of the fund arising from the sale of the mortgaged premises until the amount due Anderson upon the notes secured by the mortgage has been paid in full. Thompson for a full consideration sold the notes to Anderson, and to secure their payment not only indorsed them, but also transferred the mortgage to Anderson. Hence, whatever his rights may be as against Kilbourne, the mortgagor, growing out of the fact that he was compelled to pay the judgment rendered against both of them upon the first note, he can not, without violating the plainest principles of justice, be permitted to appropriate any part of the fund arising from the sale of the mortgaged premises until it has answered the purpose for which he transferred the mortgage to Anderson. To do so would be to permit him to impair the security he gave Anderson when the latter purchased the notes and paid his money therefor.

The decided weight of authority is in support of this view. "When," says Pomeroy, "the mortgagee assigns one or more of the notes, and retains the remainder of the series, it is generally held that the assignee is entitled to a priority of lien as against the mortgagee, with respect to the note or notes so transferred; and this rule operates without regard to the order in which the notes held by the two parties mature." 3 Pom. Eq. Juris., § 1203. And in a note to this section he adds that: "The mortgagee having transferred the note and received the consideration therefor, it would be inequitable for him to deprive the assignee of any part of its value, by insisting upon a priority or even an equality of right in sharing the insufficient proceeds."

And in 2 Jones on Mortgages it is said, sec. 1701: "Where a holder of a mortgage assigns a part of it, although he warrants only the existence of the debt at the time of the transfer, it would be contrary to good faith to permit him, after receiving the money for this part of the claim, to come into competition with his assignee, if the property prove insufficient to pay the claims of both." Again the author adds: "Unless the intention be plainly declared on the face of the assignment that the assignee is to share *pro rata* in the security with the assignor, the equitable construction of it is that it must in the first place be applied for the payment of the part of the debt which was assigned." He cites the following cases: *Waterman v. Hunt*, 2 R. I. 298; *Salzman v. Creditors*, 2 Rqb. (La.), 241, and *Barkdull v. Herwig*, 30 La. Ann. 618, which will be found to fully support the text. In the latter case the judge, delivering the opinion, says: "It is settled that a mortgagee, who transfers part of the mortgage debt to another, can not compete with his transferee for the proceeds of the mortgaged property, where the amount is not sufficient to satisfy both;" and quotes approvingly what is said in *Salzman v. Creditors*, *supra*, that "it would be contrary to good faith, that the vendor of a claim, after receiv-

ing the price of it from the assignee, should by his own act prevent the latter from receiving the sum he has paid."

As supporting what has been said, we cite also the following cases: *McClintic v. Wise*, 25 Gratt. 448; *Cullum v. Erwin*, 4 Ala. 452, approving the dissenting opinion of Gibson, C. J., in *Donley v. Hays*, 17 Serg. & Rawle, 400; *Foley v. Rose*, 123 Mass. 557; *Forwood v. Dehoney*, 5 Bush, 174.

There is no doubt but that the transfer of a mortgage, or of a note secured by it, is subject to the convention of the parties; they may stipulate that the mortgage shall inure as a security for a note or notes retained by the assignor, but in the absence of any agreement the presumption is that the assignee is to be first paid from the avails of the mortgaged property. *Noyes v. White*, 9 Kan. 640.

Such being the rule in cases where the mortgagee retained one or more of the notes, it must, *a fortiori*, be so where he not only transferred the mortgage, with all the notes secured by it, but also indorsed the latter. In such case, the fair construction of the transaction is, that he parts with all his interest in the mortgage as a security for the notes, and personally guarantees their payment. No case presenting such a state of facts is to be found, where, as against his assignee, the mortgagee has been permitted to claim any interest in the mortgage until the amount due the assignee has been fully satisfied.

No doubt exists but that between the assignees of notes, maturing at different times and secured by the same mortgage, the holders, in the absence of any agreement to the contrary, are entitled to be paid in the order that the notes mature, and, in the case of a sale of the land, the proceeds are to be marshaled accordingly. *Bank v. Covert*, 13 Ohio, 240; *Winters v. Bank*, 83 Ohio St. 250.

Again there is no doubt but that Thompson having paid the judgment upon which Kilbourn, the mortgagor, was primarily liable, has the right as against him to keep the mortgage on foot as indemnity for the amount so paid. The right is of equitable origin and is governed by principles of equity. Sheldon on Sub., ch. 1. It can not be

asserted against or to the prejudice of the creditor. *Crump v. McMurtry*, 8 Mo. 413. Anderson has the right to the entire fund arising from the sale of the mortgaged property, if necessary to satisfy the notes held by him. The right of Sharp, in the place of Thompson, is to succeed to the place of Anderson, by paying him the amount due upon the mortgage debt. *Langdon v. Keith*, 9 Vt. 299. Until the mortgagee has, in such cases, redeemed the mortgage from the assignment, he can not, for the purpose of obtaining indemnity against his principal, the mortgagor, be permitted, as against his assignee, to appropriate any part of the mortgage funds. He must, in such case, be content to follow and take what is left after the assignee has been satisfied; he may glean, but can not reap the field.

OWEN, C. J., and FOLLETT, J., concur, the former upon the grounds stated in both opinions, and the latter upon the grounds stated in the opinion of MINSHALL, J.

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BROWN v. NATIONAL BANK.

Rules of construction—Indiana mortgage upon Ohio lands—Estate passed—Foreclosure—Sale in fee-simple.

1. By a well established general rule the use of the word "heirs," or other appropriate words of perpetuity in a mortgage or other deed of conveyance of lands, is essential to pass a fee-simple estate; but this is not an inflexible rule admitting of no exception or qualification.
2. Where the language employed in, and the recitals and conditions of, a mortgage plainly evidence an intention to pass the entire estate of the mortgagor as security for the mortgage debt, and the express provisions of the instrument can not otherwise be carried into effect, it will be construed to pass such estate, although the word "heirs" or other formal word of perpetuity is not employed.
3. A mortgage was executed in Indiana upon lands in Ohio. By the terms of the mortgage the mortgagors "mortgage and warrant" the lands to the mortgagees (without the usual words of succession or perpetuity) to secure the payment of negotiable notes, and provide that upon default

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of payment they are to be "collected by foreclosure of the mortgage or otherwise." By virtue of an Indiana statute, the words "mortgage and warrant" are operative to pass a fee-simple estate in the lands mortgaged. *Held*, the mortgage security does not terminate with the death of the mortgagee; but upon a foreclosure proceeding, after the death of the latter, a sale of the mortgaged premises in fee-simple is authorized.

ERROR to the District Court of Butler county.

S. C. Gard and Morey, Andrews & Morey, for plaintiffs in error.

P. C. Conklin and Ferd. Vanderveer, for defendants in error.

OWEN, C. J. In August, 1868, George P. Brown and J. G. Weller, being owners in fee-simple of a certain tract of land situated in Butler county, Ohio, executed and delivered to George Herron a mortgage thereon to secure, among others, a note for the sum of \$4,000, payable to the order of Herron. The mortgage contains the following recitals:

"This indenture witnesseth, that George P. Brown and J. G. Weller, . . . all of Butler county, Ohio, *mortgage and warrant* to George Herron, Sr., of Mt. Carmel, Franklin county, in the state of Indiana, the following real estate in the city of Hamilton, county of Butler, state of Ohio, to wit:" (Here follows a description of the real estate.)

"Together with all the privileges and appurtenances to the same belonging to secure the payment, when they become due, of eleven promissory notes of even date herewith, the first ten being for two hundred dollars (\$200, each, . . . and the eleventh for four thousand (\$4,000) dollars at five years after date, all of the said notes being executed by the aforesaid Geo. P. Brown and J. Geo. Weller, payable to the order of the said George Herron, Sr., at Mt. Carmel aforesaid, . . . with the agreement moreover superadded, that if default be made in the payment of any of said notes at maturity, then all said notes unpaid at the time of such default shall become due and payable, and to be collected by foreclosure of this mortgage or otherwise."

This mortgage was executed and delivered in the state of

Indiana. The cause, which was one to foreclose this mortgage and others subsequent thereto, was tried on appeal in the district court.

It was established as a fact in the case that by the statutes of the State of Indiana, the operative words in a mortgage conveyance are "mortgage and warrant," and the same convey to the grantee in the mortgage an estate in fee-simple in the lands described, without the use of the words "heirs and assigns forever," or any other words of perpetuity.

This mortgage was duly recorded in Butler county, Ohio, and its record antedates all other liens. Herron, the mortgagee, died before the maturity of the note which the mortgage was intended to secure.

The plaintiffs in error, Brown and Carr, duly acquired title to the note and mortgage after his death.

Other mortgage liens having attached to the lands, after the death of Herron, the controversy which we are considering, involves the question of the priority of these subsequent liens to that of the Indiana mortgage. Among other things, the district court held that this mortgage conveyed to Herron only a life estate in the lands (by reason of the omission of words of perpetuity), that at his death the estate terminated, and the mortgage ceased to exist as a lien thereon. The decree and order of distribution of which the plaintiffs in error complain were based, chiefly, upon this holding. While other questions arise upon the record and are discussed by counsel, we place our disposition of the case upon the conclusion we have reached upon this question, and to it alone we address our consideration.

Did the security which this mortgage created in favor of the holders of the \$4,000 note, which it describes, die with the mortgagee?

Two cases are relied upon to support the conclusion of the court below, that but a life interest was pledged by the mortgage in question to secure the notes of the mortgagors. They are *Sedgwick v. Laflin*, 10 Allen, 430, and *Clearwater v. Rose*, 1 Blackf. 137.

In the former case it was held that "a mortgage of land

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to an individual, 'his successors and assigns forever,' conveys only a life estate, although it contains a power of sale, which has never been executed, authorizing the mortgagee, in case of default in the performance of the condition, to sell the land and execute a conveyance thereof in fee-simple." The proceeding was by writ of entry to foreclose the mortgage and clearly required an estate in fee in the plaintiff to support it. An examination of the opinion shows that the conclusion of the court is based upon an early colonial statute, which the court say "was inserted in each successive revision of the laws of the colony; and so the law of Massachusetts has continued to this day as to all deeds, except conveyances upon such trusts as in their nature require an estate in fee to support them."

This statute provided "that in all deeds and conveyances . . . wherein an estate of inheritance is to pass, it shall be expressed in these words, or to the like effect, viz: 'To have and to hold the said house or lands, respectively, to the party or grantee, his heirs and assigns forever.'" Concerning the power to sell, the opinion declares: "This power, if it could be executed at all according to the provisions of this mortgage, and had been executed, might perhaps *have transmitted an estate in fee* in the land; but not having been executed, that point does not arise. It is, to say the least, very doubtful whether this power is sufficiently definite to be executed at all; for it only authorizes a sale 'at public auction, according to the act in such case made and provided;' and our statutes contain no regulations on the subject."

In the case of *Clearwater v. Rose*, cited *supra*, Scott, J., says: "That the interest conveyed by the mortgage is only a life estate, there is no doubt. The mortgage contains no words of inheritance; *nothing which shows that the grantor intended such a perpetuity of interest as is essential to an estate in fee.*"

These cases are relied upon in 1 Jones on Mortgages, sec. 67, to support the statement of the author that a mortgage without the word "heirs" in the habendum

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clause conveys but a life estate, and that the estate is not enlarged by a power of sale and conveyance in fee-simple.

It may be conceded that, as a general rule, the use of the word "heirs" is essential to the conveyance of a fee-simple estate in lands. This, however, is not to be accepted as an iron rule, admitting of no exceptions or qualification. *Gould v. Lamb*, 11 Met. 86.

"Every deed is to be so construed as, if possible, to give effect to the intention of the parties. It is to be construed most strongly against the grantor. If the intention of the parties, apparent upon the face of the instrument, can not be carried into effect, this object should be attained as far as is possible." *White v. Sayre*, 2 Ohio, 118.

In *Bobo v. Wolf*, 18 Ohio St. 465, Day, C. J., said that, in determining the true construction of a deed, "we must seek for the real meaning intended to be expressed by the language used in the deed. For this purpose we may read it in the light of the circumstances that surrounded the parties at the time it was executed."

Looking to the circumstances of the parties at the time of the execution of this mortgage we find them attempting to provide a security for the payment of several thousand dollars, evidenced by negotiable promissory notes.

This is sought to be done by pledging certain real estate by the use of a mortgage deed. We find the mortgagors in the state of Indiana. The form of the instrument used to express their intention is such as the law of that state expressly authorized and prescribed for the conveyance of lands in fee-simple as mortgage security for a debt. We are not unmindful of the principle that deeds intended to convey or incumber an interest in lands situated in one state, executed in another, must derive their vitality from the laws of the former.

It was to give effect to such instruments that it has long been provided in Ohio that: "All deeds, mortgages, . . . for the conveyance or incumbrance of lands . . . situate within this state, executed and acknowledged, or proved in any other state, . . . in conformity with the laws of

this state, . . . shall be as valid as if executed within this state." (Sec. 4111, Revised Statutes.)

It is not our present purpose to construe this provision, or to say that it gives to the instrument before us the same effect it would have had as a mortgage of Indiana lands. We leave that question unconsidered. We are dealing with this feature of the case as one of the circumstances in the light of which the parties were dealing at the time of the execution of this instrument. By its terms the mortgagors declared that they "mortgage and warrant" the lands described, "to secure the payment, when they become due, of eleven promissory notes," etc.

This word "mortgage" is one of potent significance. When used as a verb (as it is in the instrument before us), Webster defines it: "1. (Law.) To grant or convey, as property, for the security of a debt, or other engagement, upon a condition that if the debt or engagement shall be discharged according to the contract, the conveyance shall be void, otherwise to become absolute, subject, however, to the right of redemption."

It was unmistakably the intention of the parties to this deed that the lands described were to be pledged as a security for the debt. That such security should abide until the debt was paid. It would do violence to the language used to suppose that the parties contemplated that only a life estate was being pledged for that purpose—that the security was destined to die with the mortgagee. It is a familiar principle that whatever changes the evidence of a mortgage debt may undergo, or into whosoever hands it may pass, the mortgage security still attaches to it and remains an incident of it until it is discharged. *Patterson v. Johnston*, 7 Ohio (part 1), 227; *Choteau v. Thompson*, 3 Ohio St. 428; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65.

These notes were, by their terms, negotiable. This mortgage was plainly intended to devote the lands described in it to the purpose of securing the payment of these notes, into whosoever hands they should pass. Whatever estate was necessary to secure the payment of

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these notes must have been intended to pass by this mortgage. This mortgage further provides that if default be made in the payment of any of these notes they are "to be collected by *foreclosure of this mortgage* or otherwise." If the recitals of this mortgage to which we have already called attention leave any doubt as to its real purpose, it is solved by the provision last cited. If the term "foreclosure" was employed in its general legal sense, we see (Bouvier's Law Dic.), that the parties contemplated: "1. A proceeding in chancery by which the mortgagor's right of redemption of the mortgaged premises is barred or closed forever. 2. This takes place when the mortgagor has forfeited his estate by non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption; in such case, the mortgagee may file a bill calling on the mortgagor, in a court of equity, to redeem his estate presently, or, in default thereof, to be *forever closed or barred from any right of redemption.*"

It is more reasonable to suppose, however, that it was contemplated by the parties that the foreclosure proceedings provided for by the mortgage must be instituted in the state and county where the lands were situated. This necessarily involved the sale of the mortgaged premises. (Section 5316, Revised Statutes.) The purchaser under such a proceeding takes the complete title of both mortgagor and mortgagee. *Carter v. Walker*, 2 Ohio St. 339; *Parmenter v. Binkley*, 28 Ohio St. 36.

By no other method known to our law can the mortgagor's equity of redemption be barred and foreclosed. Thus we see that by the express provisions of this mortgage a purchaser may become invested with a fee-simple estate in the lands "mortgaged" to secure the note which passed into the hands of the plaintiffs in error.

In the case of *Sedgwick v. Laftin*, *supra*, it is practically conceded that if the power of sale which the mortgage contained had been executed, it would have passed an estate in fee in the mortgaged premises. In the case at bar the parties for whose benefit the mortgage was made—the

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holders of the mortgage debt—are proceeding to execute the express provisions of the mortgage by foreclosing the equity of redemption through a sale of the lands. Instead of an authority against the claim of the plaintiffs in error, the case last cited is in reality one of its strongest supports. Instead of this mortgage being one wherein (in the words of the opinion in the case of *Clearwater v. Rose, supra*) there is “nothing which shows that the grantor intended such a perpetuity of interest as is essential to an estate in fee,” the conclusion is irresistible that such a perpetuity of interest was not only intended to pass, but it is expressly provided for. This case, therefore, is not found to stand in the way of the construction contended for by the plaintiffs in error.

From the construction of this mortgage which prevailed in the court below, the strange result must follow that the enforcement of the express stipulations of the parties according to their plain and manifest intention is impossible. If but a life estate passed to the mortgagee, and the security was buried with him, one of the vital and important provisions of the instrument—that which provides for the collection of the note upon default of payment—must perish. A proposition so at war with the familiar rule which requires us to construe every deed most strongly against the grantor can not prevail.

We are here to enforce, not to defeat, the deliberate agreements of parties.

It is not necessary to assume that the subsequent incumbancers are charged with notice of the statute of Indiana, prescribing a form of conveyance necessary to constitute a mortgage in fee of lands. There are sufficient recitals in this mortgage to evidence the intention of the parties to it, and the record of it sufficiently charged all persons dealing with the lands with notice of what that intention was.

While we may not be able to harmonize all the adjudications upon this question, the better doctrine seems to be that where the language employed in, and the recitals and conditions of, a mortgage plainly evidence an intention to pass the entire estate of the mortgagor as security for the

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mortgage debt, and the express provisions of the instrument can not otherwise be carried into effect, it will be construed to pass such estate, although the word "heirs" or other formal word of perpetuity is not employed.

The conditions of this mortgage, construed together, plainly bring it within the exceptions to the general rule that the use of the word "heirs" is essential to the conveyance of an estate in fee-simple, or other interest greater than a life estate.

The district court erred in holding that but a life estate was conveyed by the mortgage in question.

This conclusion removes the necessity of considering other assignments of error. The judgment of the district court is reversed, and the cause remanded to the circuit court for further proceedings, in accordance with the above holding.

FORSYTHE v. WINANS, CITY SOLICITOR.

Section 1777, Revised Statutes—Bond for injunction—Contempt of court.

Error to the District Court of Greene county.

Charles Darlington, for plaintiff in error.

James Winans, for defendant in error.

BY THE COURT. Where, under the provisions of section 1777 of the Revised Statutes, a solicitor of a municipal corporation brings suit to enjoin the misappropriation of money by the council, he is not required to give an undertaking, and an injunction so allowed by a court of competent jurisdiction, or a judge thereof, operates without such undertaking being given; and the members of council, or any of them, violating the injunction after notice thereof has been served upon them, are liable to be punished for the same as for a contempt of the authority of the court.

Judgment affirmed.

THE BOARD OF EDUCATION OF LYME TOWNSHIP v. THE BOARD
OF EDUCATION OF SPECIAL SCHOOL DISTRICT No. 1 OF LYME
TOWNSHIP.

Right of one school district to recover from another taxes erroneously received by latter belonging to former.

ERROR to the District Court of Huron county.

John A. Lemmon, for plaintiff in error.

S. A. Wildman, for defendant in error.

BY THE COURT. In each of the years from 1870 to 1875, inclusive, the Board of Education of Special School District No. 1, of Lyme township, Huron county, made a levy for school purposes, which was certified to the auditor of the county, and by him placed on the duplicate against all the lands within the district, except the property of that portion of the Lake Shore and Michigan Southern Railway and Western Union Telegraph lines running in and through the district, which, by the mistake of the auditor, were omitted therefrom; and during the same years the Board of Education of Lyme township made levies for like purposes, which were also certified to the auditor of the county, who, by mistake, placed the same, not only on the property in the district of the township, but also upon the property of said railroad and telegraph companies, as part of the property subject to taxation in the township district. The Board of Education of the Special School District now seeks to recover of the board of the township the taxes so collected by the latter, as received to the former's use. *Held*, that the taxes so received by the Township Board were not produced by any levy made by the Board of the Special District; that there is no privity between the two boards, and the action can not be maintained.

Judgment of the district court and of the common pleas reversed, and judgment for defendant below, and for its costs.

CRAWFORD v. RAMBO.

Riparian proprietors—Rights and duties—Embankments—Floods—Remedy of adjoining owner.

1. The owner of land situate upon a river, or other running stream of water, has the right to construct embankments thereon for the purpose of protecting it from the currents of the stream, or otherwise benefiting it, subject to the duty of so constructing the same as not to occasion material injury to the lands of others situate upon the stream, where the same may be avoided by the exercise of ordinary care, intelligence, and foresight.
2. It is his duty, in the first instance, to exercise such prudence and care as an ordinarily careful and intelligent man might have exercised, as to whether his proposed embankment would cause material injury to the lands of his neighbor at the time of such floods as might reasonably be anticipated at any season of the year.
3. By material injury must be understood, an injury resulting in damages of a substantial nature; not merely nominal; and which are, in some cases, awarded to prevent a wrong from ripening into a right by lapse of time. The use of streams and their water is, among riparian proprietors, a matter of common right, and an invasion of the individual right of one, can not be appreciated until some act is done by another in excess of the common right.
4. Where a riparian owner constructs an embankment upon his own lands, that occasions substantial injury to the lands of a neighbor upon the stream, and which might, at the time, have been anticipated by a man of ordinary prudence and intelligence, he is liable in damages for the injury as occasioned. And where it appears from its subsequent action, though not at the time of its construction, that it does and will continue at ordinary floods to do injury to his neighbor's lands, it then becomes his duty to abate or so modify it as to avoid such injury, and he is liable in damages for an omission to do so.
5. Where an adequate remedy in the way of damages can not be had, the court may, in a proper case, order the abatement of an embankment that occasions substantial injury to the lands of another.

ERROR to the District Court of Muskingum county.

The original action was brought by the plaintiff to recover of the defendants damages to his lands caused by the construction of an embankment by them on their own lands

44	279
48	68
44	279
54	285

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to prevent the same from being overflowed and injured by the water of the Muskingum river, on which the lands of the parties are situated.

The common pleas sustained a demurrer to the petition on the ground that it did not state sufficient facts; the judgment was, on error, affirmed by the district court, and this proceeding is prosecuted here to obtain a reversal of both judgments.

The petition sets forth, at great length, the relative situation of the lands of the parties on the river; the mode and manner in which the embankment has been constructed; that the effect of it since its construction has been, and is, to divert the flow of the water from the lands of the defendants, over which it has always heretofore flowed in times of floods, to and upon the lands of the plaintiff. The effect of the overflow upon the lands of the plaintiff, he avers, "was to and the same did increase the volume of water on plaintiff's said lands and inundated and overflowed a large portion of said plaintiff's lands, and drowned and injured crops and grass thereon, and created rapid and whirling currents thereon, none of which would have happened but for the erection of said embankment by the defendants as aforesaid; and said last mentioned water did wash a considerable portion of the soil off plaintiff's said lands, thereby rendering them less valuable for cultivation, and washed gullies and holes in said lands, and floated, lodged, and deposited trees, logs, stumps, brush, trash, and gravel thereon and prevented a considerable portion of the silt or sediment which would otherwise have been deposited on said lands as aforesaid, and the formation and accumulation of accretions along the bank of said river on the south side of plaintiff's said land as aforesaid, from being so deposited, formed, or accumulated; and undermined and washed away a considerable portion of the banks of said river on the south side of said plaintiff's lands as aforesaid, and washed out trees that were growing on the bank of said river on the plaintiff's said lands; which

said bank and growing trees formed a natural protection to the bank of said river on said plaintiff's lands against the wash of the waters of said river in its natural course and flow."

For which he claims damages in the sum of \$5,000.

As a second cause of action he makes in substance the same averments, and asks for an abatement of the nuisance to his lands.

R. M. Voorhes and E. W. James, for plaintiff in error.

A. W. Train and F. H. Southard, for defendants in error.

MINSHALL, J. The question in this case is, whether the owner of land upon a natural stream of water, so situate that in times of flood it is overflowed by the superabundant water, may, to benefit his own lands, construct an embankment thereon, the natural and probable consequence of which must be, and is, at times of ordinary floods, to cause the swollen current to overflow, erode and destroy the lands of another proprietor thereon. We have so stated the question in this case, because, as we think, the question as to surface water is not involved in it.

The premises of the parties are situate upon a bend of the Muskingum river, those of the plaintiff being upon the exterior and those of the defendants upon the interior of the bend; the included lands being divided between Rambo on the one side, and the Littles on the other, by a line running a little east of south. It is upon this line, beginning at a point about 180 feet south of low water mark on the interior bend of the river and extending some 2,900 feet thereon, that the embankment has been constructed by the defendants. It serves to protect the lands included by the bend from the violence of the current that flows across the same when the river is swollen by a flood; and was constructed by the united labor and expense of the defendants for their mutual benefit. It necessarily acts as a partial dam to the current when the river is swollen by floods; and, as averred, causes the flood water to flow over and upon

the lands of the plaintiff with destructive violence, doing him great damage at such times.

It is difficult to see upon what principle the flood-waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that when swollen by rains and melting snows it extends and flows over the bottoms along its course, that is its flood channel, as when, by droughts, it is reduced to its minimum, it is then in its low water channel.

Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well defined channel in which it is accustomed to, and does flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream, and ceases to be surface water.

So that, as we think, it is not material to inquire in this case what the law is as to surface water, for the facts stated in the petition do not present such a case.

The maxim, *Sic utere tuo ut alienum non lædas*, would seem to apply with peculiar propriety to a case like this. Each proprietor on a river has a right to the enjoyment of its waters as it flows by his premises, and the right, also, to modify and limit its current upon his own property as will best subserve his own convenience and notions of propriety; and he may, therefore, construct and maintain embankments thereon for the purpose of protecting any part of his lands from being injured by the overflow of the river in times of high water; but it is equally clear that this right to deal with the river and to control its current must be exercised with a just regard to the rights of others. He can not, by the construction of embankments or otherwise, divert the waters of the river from his own lands and cause them to flow over and upon those of his neighbor, to the

substantial injury of the latter, however beneficial it may be to his own lands, without violating this elementary maxim of justice. There is little or no difference in the authorities upon this subject. Thus, Angel in his work on Water-courses, section 333, says: "A riparian proprietor may, in fact, legally erect any work in order to prevent his lands being overflowed by any change of the natural state of the river, and to prevent the old course of the river from being altered." "But," he adds at section 334, "a riparian proprietor for his greater convenience and benefit has no right to build any thing which, in time of ordinary flood, will throw the water on the grounds of another proprietor so as to overflow and injure them." To this may be added what is said by Wood in his work on Nuisances, section 350: "While it is true that a riparian owner may erect bulwarks to protect his property from injury by the stream, yet they can only do this when it can be done without injury to others, either to an owner upon the opposite side of, or to those above or below him on the stream." He then cites the case of *Gerrish v. Clough*, 48 N. H. 9, where the defendant had erected a breakwater upon his bank of the river to protect it from injury by the water, but the effect of this was to throw the water against the plaintiff's land upon the opposite side, and in high water his land was washed away, and the injury was held to be actionable. And so, in *Valley Railway Co. v. Franz*, 43 Ohio St. 623, it was held by this court, that "a railway company, like an individual, may, on its own land and for its own benefit, lawfully cut a new channel for a stream of water, and turn such stream into such new channel, if thereby no damage is caused to another; but when it so controls and directs the course of the stream that . . . the water is thus thrown across the old channel and against and upon the land of another, and thereby causes damage to such other, the company is liable for such damage."

The difference arises as to surface water. In some of the states the rule of the civil, and in others that of the common law, prevails. The former requires each tenement to

submit to the conditions imposed on it by nature, so that the owner of a lower tract can not divert the water that flows to and upon his own from a higher one to the injury of the latter. This rule was recognized by this court in *Butler v. Peck*, 16 Ohio St. 334, and was adopted as the rule of its decision in *Tootle v. Clifton*, 22 Ohio St. 247.

The civil law acts upon the maxim that water is descendible by nature, and that its usual flow should not be interfered with, so that its burden, if it be one, should be borne by the land where it naturally flows, rather than by land where it can only be made to flow by artificial means. The common law does not recognize this principle as to surface water, but permits any one to protect his own premises from it as he may choose to do, without becoming liable to others injured thereby; or, more properly, it does not regard it as an injury to do so, whatever inconvenience or loss may result to others therefrom. It is not necessary, as we have said, to discuss the merits of either system in this case, as the injury complained of does not arise from an interference with the flow of surface water.

The maxim of the civil law, *Aqua currit et debet currere ut currere solebat*, applies generally to running water, in the common, as well as in the civil, law, subject to such reasonable qualifications as the interests of agriculture require and the enjoyment of private property will permit. *Barkley v. Wilcox*, 86 N. Y. 140. As each owner has the right to protect his own lands from the violence of the current, or to improve the same, by the erection of embankments, and, as a rule, this can not be done without increasing to some extent the flow upon the opposite side, it follows that this must be permitted to some extent by all owning lands upon the stream, or the right can not be exercised by any one of them. Such a rigid application of the principle of the maxim would materially impair the interests of agriculture in some, if not all, of the most fertile valleys of the state, without any necessary requirement on the part, if not to the detriment, of private property.

It is true, as a rule, that every invasion of a private right

imports an injury for which the law will allow a recovery of nominal damages at least, for the purpose of maintaining the right, and preventing the wrong from ripening into a right by lapse of time. *Tootle v. Clifton*, *supra*; Sedg. Dam., ch. II.

As a rule the infringement of a right can be determined without regard to the damages that may have been occasioned, the injury and the damage being plainly separable. But this is not so plainly the case among riparian proprietors. They have a common right in and over the waters of the same stream, and the invasion of the individual right of one in the subject of their common enjoyment can not be determined until some act is done by another that is in excess of the common right of all in the same subject. So that in such cases, before an action can be brought by one riparian proprietor against another for an infringement of the former's right as such proprietor, he must show that he has been substantially damaged by the act of the latter. This was the rule applied to the deepening of waters in streams by mill-dams, in the cases of *Cooper v. Hall*, 5 Ohio, 820, and *M'Elroy v. Goble*, 6 Ohio St. 187; and was applied by analogy to the corrupting of air by smoke in *Columbus Gaslight and Coke Co. v. Freeland*, 12 Ohio St. 392. And we see no good reason why it should not be applied in cases like the present, where an embankment is constructed by one for the protection of his land upon a stream, all others owning lands upon it having, for the same purpose, a like right; and the public having the same general interest in the encouragement of agriculture that it has in mills. The principles of an enlightened system of jurisprudence should be made to vary with circumstances, and be so applied as to meet the wants and condition of a people. It is with this qualification that, as has been frequently observed by its courts, the common law has been adopted in this state.

But the argument of the learned counsel for the defendant, drawn from the interest of agriculture, goes too far, when, as they seem to claim, one private owner upon a stream may, for his own benefit, erect an embankment that will

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cause its water in times of ordinary floods to overflow and destroy the lands of his neighbor. Unless this right to erect an embankment be limited, as above stated, what limit could be set to the exercise of a similar right in any other case? The right of private property, so carefully guarded in the fundamental law against public encroachment, might be wholly destroyed by that of individuals. If the general interests of agriculture require the taking of private property for the construction of levees, there is ample power in the legislature to authorize this to be done by some general statute making provision for compensation to owners for damages sustained.

But as the effect of a certain embankment acting upon the waters of a stream, when at its flood, can not be known with certainty by a man of ordinary knowledge and skill until the experiment has been made, it must follow that when a proprietor constructs an embankment for the benefit of his own land he should not be held liable for its unforeseen results to his neighbor, if at the time he constructed it he exercised the care and skill of an ordinarily skillful and intelligent man. It was upon this principle that the case of *Railroad Company v. Carr*, 38 Ohio St. 448, was decided. The duty, however, of a land-owner upon a river, in making changes thereon for his own benefit, to exercise reasonable care and caution not to injure others, "both in the inception and execution of the work," and his liability to the party injured for his omission to do so, is fully recognized in the first two propositions of the syllabus.

After, however, the occurrence of an ordinary flood has shown the tendency of the embankment at such times to occasion injury to an adjacent proprietor, and that its effect at each recurring flood will be to cause additional injury, the duty on his part at once arises to obviate the cause of the injury; and if he fails to do so his liability, from such time must, upon principle, be the same as it would have been could he have foreseen the result in the first instance. He can not, by the exercise of care and diligence in the first instance, acquire the right to continue a nuisance to

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the lands of his neighbor. Care and diligence in constructing the embankment can only exonerate the party building it from such damages as were unforeseen at the time. The liability that may arise from a continuance of the cause of injury, after its character becomes apparent, was not presented in *Railway Co. v. Carr, supra*, as that action was simply brought for damages that had been occasioned to the crops of the plaintiff below, at the flood of August 1, 1875.

As to whether the plaintiff is entitled to relief upon his second cause of action, it is sufficient to say, that in a proper case, on a final hearing, a decree may be entered for the abatement of a nuisance. But it necessarily depends upon a variety of circumstances, whether such a decree will be entered. In the first place equity requires that the plaintiff shall have acted with promptness in objecting, and in taking steps to enforce his objection, upon receiving notice of the defendant's structures and erections, which are sought to be abated, if the circumstances are such that the defendant would be unnecessarily prejudiced by the plaintiff's delay; and the injury must be of a substantial and permanent nature, and not capable of an adequate compensation in damages. 3 Pom. Eq. Juris., § 1359. It is sufficient, however, in this regard, that the damages are of such constant and frequent recurrence, that no adequate compensation can be made thereby. Wood on Nuis., § 778.

Judgments reversed, and cause remanded to circuit court, with directions to overrule the demurrer to the amended petition, and for further proceedings.

RAILROAD COMPANY v. RAILWAY COMPANY.

Rules of construction—Contract—Several writings.

1. In construing a written agreement in which the parties claim the words and expressions contain their true intent and meaning, and there is no

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claim of fraud or mistake, there should be given to each word and expression that plain and obvious meaning which the context and the whole instrument require to make each part consistent with the whole and which will secure and carry into effect the object of the parties.

2. When a written agreement consists of more than one distinct writing or contract, the different provisions of all the parts should be given due weight in ascertaining the intended meaning of any portion of the same; but if the language is clear and distinct, and the plain and obvious meaning of the words is consistent with the whole instrument, such meaning must be taken as the intended meaning of the parties, unless other parts of the agreement not only admit of, but require, a different construction.

RESERVED in the District Court of Clarke county.

The Cincinnati, Sandusky and Cleveland Railroad Company and the Columbus, Springfield and Cincinnati Railway Company brought suit against the Indiana, Bloomington and Western Railway Company, in the court of common pleas of Clarke county, to recover \$33,928.36 and interest, as the balance due plaintiffs from the defendant on account of rent accruing during the first two quarters of a lease made by the plaintiffs to the defendant March 8, 1881. All these companies are distinct and separate corporations, and each owned a distinct line of railway.

In November, 1870, the Cincinnati, Sandusky and Cleveland Railroad Company entered into the following lease:

“Whereas, The Cincinnati, Sandusky and Cleveland Railroad Company, a lawful corporation under the laws of the state of Ohio, and whose railroad extends from Dayton to Sandusky in said state, and the Cincinnati and Springfield Railway Company, also a lawful corporation in the state of Ohio, whose proposed railroad extends from Cincinnati to Dayton, have lines of railroad continuous and connected at Dayton, in said state, have entered into an arrangement for their common benefit and consistent with and calculated to promote and better carry out the objects for which they were created:

“Now, therefore, this indenture, made this twenty-eighth (28th) day of November, A. D. 1870, between the said Cincinnati, Sandusky and Cleveland Railroad Company, party of

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the first part, and the said Cincinnati and Springfield Railway Company, party of the second part, witnesseth :

“That the said party of the first part, for and in consideration of the payments, covenants, and agreements hereinafter mentioned and contained, by said party of the second part, its successors and assigns, to be paid and performed, by these presents, grants, demises and lets unto the said party of the second part, its successors and assigns, who agree to lease the same, so much of its railroad extending from its terminus, in the city of Dayton, in the county of Montgomery, and in the state of Ohio, to its passenger station, in the city of Springfield, in the county of Clarke, and in the state of Ohio, together with the right to the joint use, with the party of the first part, of its passenger station in the city of Springfield, and so much of its side tracks, freight houses, turn-tables, water stations, depot grounds, and grounds for the erection of shops and fixtures, and grounds for additional side tracks, and approaches to the same, as is consistent with the use and subject to the same by the party of the first part, for the transaction of its business in the city of Springfield; also all the depot grounds, side tracks, water tanks, station houses, warehouses, machine shops, engine shops, turn-tables, and all fixtures, rights, and privileges of the party of the first part, in the city of Dayton, together with the right of way to all lands upon and over which the bed of said railroad is located and constructed, also all things appertaining to said right of way and road-bed, together with all side tracks, wood and water stations, passenger and freight houses, gravel pits, and the appurtenances of said portion of said railroad, between the city of Dayton and the city of Springfield aforesaid.

“And the said party of the second part, its successors and assigns, shall pay all taxes and assessments whatsoever, excepting on premises in the city of Springfield, in the joint occupation of the parties to this agreement, which at any time during the continuance of the said term may be assessed or levied on said railroad, or other premises hereby

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leased, or any part thereof, or on the said first party, its successors or assigns, on account thereof.

"The taxes, assessments, repairs, and renewals on said premises in the joint occupation of said parties shall be shared and paid by said parties, one-half by each respectively, and the taxes and assessments upon all other property rights and interest at Springfield, in the exclusive occupation of either of said parties, shall be paid by the party using the same, and the said party of the first part hereby covenants and agrees that until said second party, its successors and assigns, shall take the actual possession of said railroad and the other premises hereinbefore mentioned, it will keep and maintain the same in repair and running order, the same in all respects as it and they now are—

"To have and to hold the above mentioned and described railroad and premises with the appurtenances unto the said party, its successor and assigns, from such day as it shall run its own train from the city of Dayton, over its own road, to the city of Cincinnati, upon giving sixty (60) days' previous notice in writing to the party of the first part, and in any event not later than the first (1st) day of April, A. D. 1872, for and during and until the full end and term of ninety-nine (99) years thence next ensuing and until the end and term of all renewals and extensions of this lease and of said term, as hereafter provided.

"And in consideration of the premises it is hereby agreed that during the said term of ninety-nine (99) years, and said renewals and extensions thereof, the entire gross earnings and receipts accruing by the operating and the use of the said railroad and the premises hereby granted and demised, to be divided between the parties to this agreement in the following proportions:

"To the said party of the first part, thirty-five (35) per centum, and to said party of the second part, sixty-five (65) per centum thereof; that is to say, the said party of the first part is to receive from said party of the second part at the time and in the manner hereinafter mentioned for the use of said railroad and other premises thirty-five (35) per

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centum of said gross earnings and receipts without deductions for expenses, taxes, assessments, terminal charges, losses, damages, or abatement for any other reason, or in any other manner whatever, whereby the sum thus to be received might be reduced; said gross earnings to be determined from the entire gross receipts and earnings from all sources whatsoever, or however derived of the said railroad and property hereby leased, or any portion thereof, and the business shall be so transacted, and the books shall be so kept by said second party, as to clearly exhibit the entire gross earnings without deductions as aforesaid of the said railroad and premises hereby leased. Said sum shall be paid over to said party of the first part at its office in the city of Sandusky, in quarterly payments within thirty (30) days after the last days of December, March, June, and September in each and every year, for the quarter preceding, and said second party shall furnish and deliver to said first party semi-annual accounts of said gross earnings, and allow said first party such access to its books, documents, and papers as may be required to ascertain the correctness of said accounts.

“Provided always, and these presents are upon this express condition, that if the said party of the second part, its successors and assigns, shall fail to pay said party of the first part, its successors or assigns, said proportional part of said gross earnings, or any part thereof, for a period of thirty (30) days after the same ought to have been paid as aforesaid, or in case the said second party, its successors and assigns, shall not from time to time, and at all times during the continuance of this demise, well and truly observe, perform, and keep all and singular the covenants, conditions, and agreements which are or ought to be kept and performed by said second party according to the true intent and meaning of these presents, then in any and every such case the said party of the first part, its successors and assigns, without notice or demand of forfeiture, said default still continuing, shall have the right to re-enter upon said railroad and the premises herein demised, and to have again, repossess and

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enjoy the same, as of its, or their former estate, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding.

“And the said party of the second part, its successors and assigns, hereby covenants and agrees with the said party of the first part, its successors and assigns, that said second party, its successors and assigns, will, during the term hereby granted, well and truly pay unto said party of the first part, its successors and assigns, the said sum above reserved, at the time and in the manner limited and prescribed as aforesaid for the payment thereof, according to the true intent and meaning of these presents; that it will use said railroad in connection with a railroad to be built by said second party between the city of Dayton and the city of Cincinnati, so as to form a trunk road from the city of Cincinnati by the way of the city of Springfield to Cleveland, Sandusky, and Columbus.

“And said party of the second part further agrees that it will receive and transport over its road with promptness and dispatch all freight and passengers, and transact all the business destined for Cincinnati and other points either on its own or any other railroad, and for points beyond Cincinnati, that comes over the railroad under the management and control of the said party of the first part, the said party of the first part fixing the rate therefor to all points; and in like manner the party of the second part is to fix the rate of transportation on all freights and business originating at Cincinnati or beyond or on the line of its road passing over the road of the party of the first part, to all points; and the rates thus fixed on all such through business, or business between said points, by the parties respectively, shall be divided between them pro rata according to distance hauled by each party.

“All unconsigned passenger and freight traffic for points south of Springfield, and controlled by the party of the first part, shall be delivered to and forwarded by the party of the second part from Springfield over the road owned and operated by said second party.

"All business controlled by the party of the second part destined to all points west of the railroad between Springfield and Cleveland via Delaware, and west and south and north-west thereof via lake and rail, or all rail, and to all points on the Columbus road of said party of the first part, and points east and south thereof via Columbus, shall be forwarded by the railway of the party of the first part from Springfield; and that on all such business destined to or from the territory agreed upon herein as belonging to and sent over the roads of the said first party, said second party will not prorate on such business, except in connection with the said first party's road; and that to any other railroad said second party shall charge and collect on all such business its full local rates for the distance it shall transport the same, and the second party shall make no lower rates of transportation on either passengers or freight between Cleveland and any point south of Springfield on local business than shall be made on same class of business between Sandusky and same points; and also that said party of the second part, its successors and assigns, shall, during the said term, maintain and keep in repair said railroad and other premises hereby granted, and renew and replace the same whenever and as often as the same shall be worn out or deteriorated by use or otherwise; and from time to time, as the nature and extent of the business requires, it will construct new and additional side tracks, stations, warehouses, and other structures and fixtures for its accommodation; that it will run and operate said railroad in such manner that the corporate rights and privileges of said first party shall not be impaired or endangered, and furnish to the public all reasonable accommodations; that it will indemnify and save harmless said party of the first part, its successors and assigns, from all liability and claims for damages and losses incurred and arising in renewing said railroad; and in general that it will maintain said railroad in such condition and that it will operate the same and furnish such machinery, cars, equipments, stations, and other appurtenances as are suited and required.

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by a railroad of the best description; and that it will use all reasonable and necessary efforts to facilitate and increase the business of said road hereby leased in preference to any other line or road.

"In making up the schedule time for all through passenger trains precedence and priority shall be given to the trains to and from Cleveland, and to and from Cincinnati via Springfield and Delaware; but the party of the first part shall have the right to run its trains to and from Columbus and to and from Sandusky and to and from Springfield to connect with the aforesaid through trains to and from Cleveland and to and from Cincinnati; and shall have the time given and right to attach one or more express, baggage, passenger, and sleeping cars and have them made part of such through trains, as shall from time to time be necessary for the prompt and efficient transaction and management of its business.

"Provided, however, that if the business of the first party is not thereby accommodated satisfactorily to said first party by the schedule of time, to be fixed as aforesaid, then the said first party shall have the right, in addition thereto, to fix the time of one train daily each way between Cincinnati and Springfield to connect with its trains to and from Columbus and Sandusky, which trains shall be so run by said second party; and the said party of the first part, its successors and assigns, further covenant and agree that on or before the expiration of the term of ninety-nine years herein contained, at the request and expense of said second party, its successors or assigns, said first party, its successors or assigns, shall grant and execute to said second party, its successors or assigns, a new lease of the railroad and premises hereby demised for the further term of ninety-nine years, to commence at the expiration of the term hereby granted, at the same time, rent payable in a like manner and subject to the like covenants and agreements as are contained in these presents; and on or before the expiration of each and every term of ninety-nine years thereafter to grant and execute new leases to the party aforesaid

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of like tenor and effect, thenceforth forever. And the said party of the first part further covenants and agrees that, upon the request of said second party, its successors or assigns, it will proceed and appropriate, under the laws of the state of Ohio, such real estate, rights, and interests as may be necessary or required for the maintenance and operation of said railroad; said second party, its successors or assigns, paying all costs or damages therefor, and for which said first party may thereby become liable. And further, that upon like request and at the cost and charge of said second party, its successors or assigns, the said first party, its successors or assigns, will make and execute such further and other lawful deeds, assurances, and confirmations of the railroad and other premises hereby granted, or intended so to be, unto said second party, its successors or assigns, as it or they shall reasonably require.

“And further, whereas the said first party heretofore has issued three series of bonds, the payment of which is secured by deeds in trust of their entire property, including the railroad and premises hereby demised, and has issued preferred stock, the aggregate amount of said bonds and stock does not exceed the sum of three millions of dollars (\$3,000,000), the said first party hereby covenants and agrees that it will pay said bonds, both principal and interest, and the dividends on said stock, as they shall respectively become payable, so as to protect said second party, its successors and assigns, in the use and peaceable possession of said railroad and the premises hereby demised; but said party of the first part, its successors and assigns, shall have the right, and this indenture is made upon the express condition that at any time hereafter, by agreement with the holders of said bonds, it may extend the time of payment of the same; or said first party may substitute for bonds now outstanding new bonds, and secure the payment of such new bonds by another deed in trust of its entire property, including the railroad and other premises hereby demised; and in such case the deed in trust last mentioned, and said preferred stock shall be a lien in all respects on

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any right, title, or interest acquired by said second party, its successors or assigns, under and by virtue of this indenture, as the former deed in trust, and with the same priority of lien; provided, however, that the total amount of bonds so extended or substituted and the amount of such preferred stock shall not at any time, without the consent of said second party, exceed the aggregate amount of three million dollars (\$3,000,000); and further, provided that in case that the party of the first part, its successors and assigns, shall fail to pay the principal or interest of said bonds or the dividends of said preferred stock for a period of thirty days after the same becomes due and payable, said party of the second part, its successors and assigns, may proceed to pay the same out of the rental created under this lease, so far as the same may extend for the payment thereof; and the said party of the first part shall account to the said party of the second part for the amount thus paid, in accordance with the terms of this lease.

"It is mutually agreed that this agreement shall be considered and held perfected and binding on the parties hereto, when assented to by the stockholders of each party in the mode and manner pointed out and prescribed by statute.

"In witness whereof, the said party of the first part and the said party of the second part, by order of their respective boards of directors, have caused their names and corporate seals to be affixed hereto, as well as to the counterpart thereof, by their respective presidents, on the year and day first above mentioned."

This agreement was duly assented to by the stockholders of each party, and on or about May, 18, 1871, the Cincinnati and Springfield Railway Company took possession of that portion of the railroad extending from Springfield to Dayton, and, through the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, has ever since operated the same under the lease.

On May, 8, 1881, the plaintiffs and the defendant, each of them being duly authorized by a vote of their respective stockholders, made the following lease:

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“Whereas, the Cincinnati, Sandusky and Cleveland Railroad Company and the Columbus, Springfield and Cincinnati Railroad Company, corporations existing by virtue and authority of the laws of the state of Ohio, and the Indiana, Bloomington and Western Railway Company, a corporation existing by virtue and authority of the laws of the states of Ohio, Indiana, and Illinois, the two former of which companies have lines of railroad constructed and in operation from Sandusky to Dayton, in said state of Ohio, and from Columbus to Springfield, in said state of Ohio, connecting at said Springfield; and whereas, the said Indiana, Bloomington and Western Railway Company now owns and operates a line of railroad from Pekin, in the state of Illinois, to Indianapolis, in the state of Indiana, and is now extending its said line of railroad from said Indianapolis to said Springfield, Ohio, by the construction of a new line of railroad so as to connect at said Springfield with the lines of railroad of said Cincinnati, Sandusky and Cleveland, and Columbus, Springfield and Cincinnati Railroad Companies, so as to form a continuous line for the passage of cars, and thereby to increase its facilities for doing an east and west bound business, and to render more profitable the large amount of freight and passenger business it expects to bring to said Springfield, and to further facilitate this purpose desires to obtain a lease in perpetuity, or for as long a time as it lawfully can, of the lines of railroad of said Cincinnati, Sandusky and Cleveland, and Columbus, Springfield and Cincinnati Railroad Companies; and whereas, the said lines of railroad are continuous and not competing, and the boards of directors of the Cincinnati, Sandusky and Cleveland, and Columbus, Springfield and Cincinnati Railroad Companies, aforementioned, having entered into an agreement to make such a lease or leases and submit the same for the consideration and ratification of the stockholders of their respective corporations; now, therefore, this indenture, made this eighth (8th) day of March, in the year of our Lord eighteen hundred and eighty-one (1881), by and be-

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tween the said Cincinnati, Sandusky and Cleveland Railroad Company and the Columbus, Springfield and Cincinnati Railroad Company, parties of the first part, and the said Indiana, Bloomington and Western Railway Company, party of the second part, witnesseth:

“That the parties of the first part, for and in consideration of the payments, covenants, and agreements hereinafter mentioned, by, for, and in behalf of the party of the second part, its successors and assigns, to be paid and performed, and upon the conditions and restrictions hereinafter stated, the said parties of the first part do hereby grant, lease, and demise unto the said party of the second part, its successors and assigns, the entire railroads of the said parties of the first part, lying in and extending from the city of Sandusky, in Erie county, to the city of Dayton, in Montgomery county, and from the town of Carey, in Wyandot county, to the town of Findlay, in Hancock county, and from the city of Columbus, in Franklin county, to the city of Springfield, in Clarke county, all in the state of Ohio, now constructed, or which shall hereafter be constructed, as provided in this agreement; that is to say, their real estate and rights of way, their side tracks, machine shops, engine houses, warehouses, road-beds, gravel pits, bridges, superstructures, tracks and appurtenances connected with the same, their depot stations, water houses, rolling stock and equipment, and all property, rights, and interests of every description acquired and now held, or which hereafter shall be acquired by said party of the first part, for the construction, maintenance, and operation of said railroads that may be appurtenant thereto and necessary for their operation, or intended for such use.

“To have and to hold said railroads and all and singular the premises, with their appurtenances herein before demised and expressed, or intended so to be, unto the said Indiana, Bloomington and Western Railroad Company, its successors and assigns, from the first (1st) day of May, A. D. 1881, for and during and until the end of the full term of ninety-nine (99) years thence next ensuing, and re-

newable from time to time for like periods forever. Provided, however, that whereas the parties of the first part have heretofore issued four series of bonds now outstanding, and have also issued preferred stock not exceeding in the aggregate four millions of dollars, the payment of which is secured by deeds of trust of the entire property of the said parties of the first part, their successors and assigns, shall have the right, and this indenture is made upon the express condition that at any time hereafter by agreement with the holders of said bonds and preferred stock they may extend the time of payment of the same; or said parties of the first part, their successors and assigns, may substitute new bonds and preferred stock therefor, and secure the payment of such new bonds and preferred stock by other deed or deeds in trust of their entire property, including the railroads and other property hereby demised, and in such case the said deed or deeds in trust last mentioned and the preferred stock shall be a prior lien in all respects on any right, title, or interest acquired by said party of the second part, its successors and assigns, under and by virtue of this indenture as the former deeds in trust, and with the same priority of lien.

“The total amount of bonds and preferred stock so extended or substituted, however, shall not at any time exceed in the aggregate the sum of four millions of dollars without the consent of the said party of the second part; and the said parties of the first part, their successors and assigns, hereby covenant and agree with the party of the second part, its successors and assigns, that during said term of ninety-nine (99) years (or any other term of years) hereby granted and demised, they will at all times keep and maintain their corporate existence and organization; that they will not knowingly do or omit to do any act or thing whereby their corporate powers, rights, or privileges, or the term hereby created, may be forfeited or endangered, and the possession and use of said railroads and premises hereby granted to said second party, its successors and assigns, restricted; and said parties of the first part, their

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successors and assigns, hereby covenant and agree with the party of the second part, its successors and assigns, that during the said term of ninety-nine (99) years, or any other term herein provided, it shall at all times, peaceably and quietly have, hold, and enjoy the said demised and granted railroad premises and appurtenances without let, hinderance, or interference from said parties of the first part, their successors or assigns, or any other person or persons whomsoever claiming from or under it or them, or either of them. And the said parties of the first part, their successors and assigns, further covenant and agree that on or before the expiration of ninety-nine (99) years, or any other term herein provided, they, or either of them, will at the request and expense of the said party of the second part, its successors or assigns, grant and execute to the said party of the second part, its successors and assigns, a new lease of the railroads and premises hereby demised for the further term of ninety-nine (99) years, to commence at the expiration of the term hereby granted, and at, or before the expiration of every renewal thereof, at the same rental, payable in like manner, and subject to the like covenants, agreements, conditions, and restrictions as are contained in these presents.

“And said parties of the first part further covenant and agree that upon the request of said party of the second part, its successors and assigns, it or they or either of them will proceed under the laws of the state of Ohio, and appropriate such real estate and rights and interests as may be required for the maintenance or operation of their or either of their lines of railroad; said party of the second part, its successors and assigns, paying all costs and damages therefor, or for which said parties of the first part or either of them may thereby become liable; and further, that upon like request, and at the cost and charge of said party of the second part, its successors and assigns, the said parties of the first part, their successors and assigns, will make and execute such further and other lawful deeds, assurances, and confirmations of the railroads and premises

hereby granted, or intended so to be, unto the said party of the second part, its successors and assigns, as it or they shall reasonably or of right require; and the said party of the second part, its successors and assigns, hereby covenants and agrees with the parties of the first part, their successors and assigns, that it will pay as rental for the aforementioned granted and demised railroads and appurtenances, thirty-three and one-third per centum of the total gross earnings and receipts of said granted and demised railroads and property, which said thirty-three and one-third per centum of said gross earnings and receipts it is hereby guaranteed by said party of the second part, its successors and assigns, shall not be less than three hundred thousand dollars (\$300,000) in any one year during the continuance of this lease, and if from any cause said thirty-three and one-third per centum of the said gross earnings and receipts should in any year fall short of three hundred thousand dollars (\$300,000), the said party of the second part, its successors and assigns will make up and pay each and every such deficit out of its or their own money, and whenever the said thirty-three and one-third per centum of the said gross earnings and receipts shall exceed in any one year the sum of five hundred and fifty thousand dollars (\$550,000), all such excess shall inure to and be retained by the party of the second part. Said gross earnings and receipts are to be determined from the entire gross earnings and receipts from all sources whatsoever, or however derived, of the railroads and property hereby leased, or any portion thereof, and the business of the roads shall be so transacted, and the books and accounts thereof so kept by said party of the second part, its successors and assigns, as to clearly exhibit the said entire gross earnings and receipts without any deductions whatever. Said amount of three hundred thousand dollars (\$300,000) per annum guaranteed rental shall be paid to the parties of the first part in equal monthly payments of twenty-five thousand dollars each, at the end of each and every month from the date of this lease; and the balance of the thirty-three and

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one-third per centum of the said gross earnings and receipts shall be paid quarter-yearly, on the first day of October, January, April, and July of each and every year from and after the date of this lease. Eight one-thirtieths of said guaranteed rental to be so paid to the said Columbus, Springfield and Cincinnati Railroad Company, and twenty-two one-thirtieths to said Cincinnati, Sandusky and Cleveland Railroad Company, and one-fifth of the balance of the said thirty-three and one-third per centum of the said gross earnings and receipts shall be paid to the said Columbus, Springfield and Cincinnati Railroad Company, and four-fifths to the said Cincinnati, Sandusky and Cleveland Railroad Company. Said party of the second part, its successors and assigns, further agrees that it or they will render to the said parties of the first part, their successors and assigns, properly detailed accounts of said gross earnings and receipts quarter-yearly, and will allow said parties of the first part, their successors and assigns, by their proper officers or employes duly authorized, such free access to its or their books, papers, and accounts, as may be required to ascertain the correctness of the accounts so rendered.

“Provided always, and these presents are upon the express condition that if the said party of the second part, its successors and assigns, shall neglect or fail to pay to the said parties of the first part, their successors or assigns, the amount of rental hereinafter provided to be paid, or any part thereof, for a period of thirty days after the same ought to have been paid as aforesaid, or in case the said party of the second part, its successors and assigns, shall not from time to time, and at all times during the continuance of this lease, well and truly observe, perform, fulfill, and keep all and singular the covenants, conditions, and agreements hereinbefore or hereinafter contained, which are or ought to be kept and performed by said party of the second part, its successors and assigns, according to the true intent and meaning of these presents, then in any and every such case the said parties of the first part, their successors

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and assigns, shall have the right to re-enter upon said railroads and other premises hereby demised, and to repossess and enjoy the same as of their former estate; any thing hereinbefore contained to the contrary thereof in any wise notwithstanding, and the said party of the second part shall be liable to the parties of the first part and each of them for all damages which they or either of them may sustain by any default of the party of the second part; but no such forfeiture shall be declared unless the said party of the first part shall have first notified the said party of the second part of the default complained of, and request the performance of this contract in that behalf by the said party of the second part, its successors and assigns; and the said party of the second part, its successors and assigns, further agrees that it or they will diligently prosecute the building of the line of railroad from Indianapolis to Springfield, hereinbefore named, and complete the same and have it duly connected and in operation with the line of railroad of said party of the second part at said Indianapolis and with the line of railroad of said party of the first part at said Springfield, on or before January 1, 1882, and will run and operate the said line of railroad in connection with the lines of the parties of the first part, and will not become interested in the earnings of any competing railroads to the roads of the parties of the first part or either of them; and said party of the second part further agrees that all business arising from its lines of railroad to said Springfield and destined for points north and north-east thereof shall be sent over the Cincinnati, Sandusky and Cleveland Railroad as far toward Sandusky as may be necessary to secure the greatest amount of earnings therefrom to the parties of the first part, and all business destined for points east and south-east thereof shall be sent via Columbus over the Columbus, Springfield and Cincinnati Railroad; and the said party of the second part, its successors and assigns, hereby covenants and agrees with the said parties of the first part, their successors and assigns, that it and they will, during the term hereby granted, well and truly pay the rental, hereinbefore pro-

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vided, promptly at the times and in the manner limited and prescribed herein for the payment thereof, according to the true intent and meaning of these presents; and that in computing the amount of the total receipts and earnings on the lines of the railroads of the parties of the first part it will allow on all through business between Peoria and Sandusky, and between Peoria and Columbus, full pro rata to each road, according to the number of miles hauled on each; and said party of the second part, its successors and assigns, further agrees that it and they will, during the continuance of this lease, maintain and keep in good order and condition, by renewals and repairs, the railroads and other property hereby demised, and to add such new cars, engines, and rolling stock as may be necessary to replace such as may become worn out or destroyed, so as to keep said equipment up to its present standard of value and efficiency; and to mark distinctly in the usual manner all such new cars, engines, and rolling stock, to denote that they belong and appertain to the Cincinnati, Sandusky and Cleveland Railroad Company, and so deliver them upon the railroad of said company, free from all liens, as its property, subject only as their other property, to the terms of this lease; and all such cars, engines, and other rolling stock shall be so distinctly marked as aforesaid, before leaving the shops or other places of manufacture. The party of the second part, its successors and assigns, will also make all renewals of track upon the railroads of the parties of the first part with steel rails of not less than fifty-six pounds to the linear yard, and will, as rapidly as good management may require, provide the entire tracks of the railroads of the parties of the first part with such steel rails; and will at all times keep and maintain the tracks of said railroads and each of them in first-class condition of repair; that it and they will also run and operate said railroads of the parties of the first part in such manner that the corporate rights and privileges of said parties of the first part shall not be impaired or endangered; that it will furnish the public all reasonable accommodation in the running of its

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trains and otherwise over said roads of the parties of the first part; that it will indemnify and save harmless the said parties of the first part from all liabilities and claims for damages and losses incurred and arising in any manner in the running of said railroads; and, in general, that it will operate said railroads of the parties of the first part and furnish such equipments, stations, and other appurtenances therefor, as are suited for and required by a railroad of the best class; and that it will use all necessary and possible efforts to facilitate and increase the business of the railroad hereby leased.

“The said party of the second part further agrees that it will pay all taxes and assessments whatsoever that may be levied by either the state of Ohio, or the United States of America, or under the authority of either thereof, on the roads and property hereby demised, or on their earnings and receipts, and on all dividends and interest which may be paid by the parties of the first part, but not including any taxes or assessments which may be made against the individual holders of the stock or bonds of the parties of the first part; that it will procure and keep policies of insurance in full force upon all bridges, docks, buildings, engines, cars, and other equipments and machinery, and other property hereby demised, to the extent at least of two-thirds of the full value thereof; and to have such policies written for the benefit of whom it may concern, and fully protecting and referring to the respective interests of the parties hereto, and in case of loss all sums received from underwriters of existing or future policies of insurance shall inure to the party of the second part, and to be expended in repairing or replacing, as the case may be, the property damaged or destroyed. The party of the second part shall, whenever requested by the parties of the first part, or either of them, furnish a special car, and transport therein the board or boards of directors of the parties of the first part, or a committee thereof, free of cost, over the roads of the parties of the first part, as often as

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four times each year, if required; giving them suitable time and opportunity to examine the condition of the roads and other property hereby demised. The party of the second part, its successors and assigns, also further agrees that it or they will not transport any wood or ties cut in any of the counties of the state through which the lines of the railroads of the parties of the first part pass at less than the regular local rates for timber, lumber, and wood. It is also mutually agreed between the parties hereto that in case the parties of the first part, their successors and assigns, shall fail to pay the interest or principal of the bonds or preferred stock herein before named, for a period of thirty (30) days after the same shall have become due and payable, the said party of the second part, its successors and assigns, may proceed and pay the same to the parties entitled thereto out of the rental created and provided for under this lease; and the amount so paid shall be charged to the parties of the first part and deducted from the money then due, or to become due, to the parties of the first part, under this lease. In case the parties of the first part should fail to extend the time of payment of any of said bonds, or negotiate new securities in lieu of them as hereinbefore provided, then the said party of the second part may renew the same at a rate of interest not in excess of that now payable in said bonds respectively, or may pay and discharge said bonds and have a lien upon the premises hereby demised for the payment of the same, and a credit on the rental herein reserved of the amount of the interest on the bonds so paid. It is also further mutually agreed and understood between the parties hereto that the Cincinnati, Sandusky and Cleveland Railroad Company sells to the party of the second part all the fuel, lumber, timber, new ties, oil waste, all new and old rails not in the track at the time this lease goes into effect, and all such stationery and other supplies furnished for use upon the lines of railroad hereby leased as may be available for use, and desired by the said party of the second part. An inventory and cost appraisal of the aforementioned supplies and

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rails shall be made before this lease goes into effect by three persons, one of whom shall be appointed by the parties of the first part, one by the party of the second part and the other by the two persons so appointed, the decision of either two of which shall be final both as to the quantities of said supplies and rails thus sold and their cost value as hereinbefore named. The total amount of which said cost value the party of the second part hereby agrees to pay in cash to the Cincinnati, Sandusky and Cleveland Railroad Company in or within thirty (30) days after this lease goes into effect.

“It is also mutually agreed that all the tracks, bridges, buildings, locomotives, cars, and other property of the parties of the first part hereby leased shall, as soon as practicable, and within sixty (60) days after the date of this lease, be duly inventoried and appraised in manner and form as hereinbefore provided for the inventory and appraisal of the supplies and rails; and said inventory and appraisal, when completed, shall be copied in triplicate, one copy thereof to be placed for filing and record with the Indiana, Bloomington and Western Railroad Company, and one copy for like purpose to each the Cincinnati, Sandusky and Cleveland Railroad Company and the Columbus, Springfield and Cincinnati Railroad Company, and also for the purpose of enabling the respective parties hereto the better to determine from time to time if any waste or depreciation of the property has taken place. Said appraisal to be made on a basis of value of gold coin of the United States of America; and at the termination of this lease a like inventory and appraisal shall be made in like manner of the same or substitute property, to determine whether all such property is then in good, better, or worse condition of efficiency; and the parties making such inventory and appraisal shall appraise the difference in value, if any, and any such difference shall be equalized by payment from one party to the other, as the case may require; and to have such waste, depreciation, or betterment and improvement, if any, as the case may be, restored and

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made good. It is also agreed by the parties of the first part that the party of the second part, its successors and assigns, shall have the right to use the name of the parties of the first part so far as it may be necessary for it to do so in bringing any actions and in making any defenses.

"It is also further agreed by the party of the second part, its successors and assigns, that the Cincinnati, Sandusky and Cleveland Railroad Company shall retain to itself for its own uses and purposes all real estate it may possess, not appurtenant to its line of railroad or necessary for its use and operation; more particularly the properties recovered from Rush R. Sloan, its former president; and whereas, the said Cincinnati, Sandusky and Cleveland Railroad Company has heretofore leased the portion of its road between Springfield, in Clarke county, and Dayton, in Montgomery county, the said party of the second part assumes such lease and all existing contracts and agreements of said parties of the first part. And it is also hereby mutually agreed that if from any cause either of the parties hereto shall neglect or fail to appoint the person herein provided to act as appraiser for the inventorying and appraisal of the supplies and rails, and of the track, locomotives, etc., hereinbefore named, it shall be competent for the appraiser appointed by the other party to appoint both of such other appraisers. And it is further agreed that the party of the second part will furnish free of charge to the parties of the first part suitable rooms and accommodations in the general office buildings at Sandusky, Springfield, and Columbus, Ohio, for the offices of the president, secretaries, and treasurers of the parties of the first part; and that until the completion of the road of the party of the second part said party of the second part will not change the managing agents and employes of the parties of the first part, except with the consent of the president of said parties of the first part.

"In witness whereof, the said parties hereunto have caused this lease to be signed by their respective presidents and attested by their respective secretaries, and have caused

their corporate seals to be hereto attached the day and year above written in triplicate."

The lease was duly executed and delivered, and on May 1, 1881, the defendant took possession of the roads and property leased, so far as it could, and holds the same. And since then, May 1, 1881, the defendant has received the rent and has enjoyed the benefits secured to the lessor by the prior lease of November 28, 1870, which was so obtained by the defendant.

At the end of the first quarter, after July 31, 1881, a dispute arose as to what rent the defendant should pay plaintiffs for the part of the road between Springfield and Dayton; whether it should be $33\frac{1}{3}$ per cent of the gross earnings and receipts of that part of the road, or only $33\frac{1}{3}$ per cent of what was paid over to the defendant, either sum making more than the minimum amount to be paid. After the end of the second quarter, on February 18, 1882, plaintiffs brought suit for the rent claimed and not paid; and they set forth the two leases in full, with amounts of gross earnings and receipt and failure to pay amounts due, and plaintiffs claimed judgment for the unpaid amount of $33\frac{1}{3}$ per cent of the gross earnings and receipts with interest.

The defendant admitted corporate existence and denied every other allegation or statement.

On the trial the court of common pleas gave judgment for the defendant. A bill of exceptions was taken; and on proceedings in error, the district court found, as matter of fact:

"That the defendant has operated since May 1, 1881, the plaintiffs' railroads between Sandusky and Springfield and Springfield and Columbus, under the lease to it in said petition exhibited; and has received from the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company the thirty-five per cent of its gross earnings and receipts on that part of said railroad between Springfield and Dayton, under the lease in said petition first exhibited, from May 1, 1881, to the bringing of this suit; and that if the true construction of the lease from the plaintiffs to the defend-

ant, exhibited in the plaintiffs' petition, be that the defendant is obliged to account for and pay to the plaintiffs thirty-three and one-third per cent of the gross earnings and receipts realized by the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company by the operation of that portion of the plaintiffs' road between Springfield and Dayton, under the lease in said petition first exhibited, then there is due and payable to the plaintiffs from the defendant the several amounts claimed in the plaintiffs' petition; but that if the true construction of the said lease from the plaintiffs to the defendant be that the defendant is required to account for and pay thirty-three and one-third per cent of the rental only, due from and paid by the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company for the use of that portion of the said railroad between Springfield and Dayton, under the lease in said petition first exhibited, then and in that case there is nothing due from the defendant to the plaintiffs, on the cause of action set forth in the plaintiffs' petition.

"And it further appearing to the court, all the judges concurring therein, that the decision of the question as to which of said constructions of said lease under the facts and circumstances set forth in the bill of exceptions in this case, is the true construction of the lease from the plaintiffs to the defendant, involves difficult and important questions of law, and all the judges of this court being of opinion that this cause ought to be reserved, it is by the court, on motion of the plaintiffs, ordered that this cause be, and the same is hereby reserved for decision in the supreme court."

Bowman & Bowman and R. P. Ranney, for plaintiffs in error.

West, Walker & West and C. W. Fairbanks, for defendant in error.

FOLLETT, J. The parties desire "the true construction of the lease from the plaintiffs to the defendant," as to one matter only; what rent shall *now* be paid to plaintiffs for the part of the railroad from Springfield to Dayton?

The corporate existence of the parties is admitted, and their competency to make the lease is not questioned. There is no claim, by either party, that there was any mistake or fraud on the part of any one; and neither party asks for any reformation or change of any part of the lease. There does not seem to be any substantial dispute between the parties as to the legal principles that govern the construction of the lease; and all agree that the per cent to to be paid is $33\frac{1}{3}$ per cent. But they dispute as to the *basis* on which to compute the *amount* of rent to be paid.

Is such basis the entire gross earnings and receipts of all the property and railroads owned and leased by the plaintiffs, including the part from Springfield to Dayton? This is the *claim* of plaintiffs; and the defendant admits that such basis would be correct if the defendant controlled and operated the entire line of railroad, and that such a basis will be correct when the prior lease is ended and the defendant comes into possession of the part from Springfield to Dayton. The defendant claims that the correct basis *now* should *not* include the gross earnings and receipts of the part of the railroad from Springfield to Dayton, but only the 35 per cent rents *received* by the defendant from the company operating that part.

The dispute is shown as follows: During a certain time the gross earnings and receipts of that part of the road are \$300,000, of which 35 per cent (\$105,000) *as rent* is paid to the defendant. Plaintiffs claim that the $33\frac{1}{3}$ per cent of the \$300,000, which is \$100,000, should be paid to them; but defendant claims it should pay only $33\frac{1}{3}$ per cent of the \$105,000 rent received by it, which is \$35,000, making a difference to each party of \$65,000 for each \$300,000 of such gross earnings and receipts. An examination of this lease of March 8, 1881, shows that the defendant agreed to "pay as rental for the aforementioned granted and demised railroads and appurtenances, thirty-three and one-third per centum of the total gross earnings and receipts of said granted and demised railroads and property." And the lease provides that, "said gross earn-

ings and receipts are to be determined from the entire gross earnings and receipts from all sources whatsoever, or however derived, of the railroads and property hereby leased, or any portion thereof."

The following plat will convey some idea of its location:



The part of the railroad from Springfield to Dayton is expressly *included* in the part extending from Sandusky to Dayton. And it is not claimed that this part is included by mistake, or that the lease anywhere excludes such part. This language is plain and specific, and includes the entire line of railroads, and provides that the "gross earnings and receipts" of the entire line shall be the *basis* for computing the rent. We need not add to the principles of construction as gathered and stated in *Lawler v. Burt*, 7 Ohio St. 340, 349. It is claimed that certain facts as to the property, and certain words and covenants of the leases, require this language to express a meaning other than the words seem to import; and that the words "gross earnings" apply to the part of the property not included in the prior lease, and the word "receipts" to the part in the prior lease.

To have such effect, the other meaning must clearly appear to be intended.

It is stated that the plaintiffs did not put the defendant into immediate possession and control of every part of the railroad.

It may be answered at once, that the defendant agreed with plaintiffs that it should not have such possession and control, and yet the parties used this language as to the *basis* of rent. When this lease was made all the parties knew that the prior lease of November 28, 1870, was in successful operation; and that the lessee had assigned that lease to the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, an efficient and responsible company; and that the lease was of great value to the lessor. These parties also inserted the following provision in their lease: "And whereas, the said Cincinnati, Sandusky and Cleveland Railroad Company has heretofore leased the portion of its road between Springfield, in Clarke county, and Dayton, in Montgomery county, the said party of the second part assumes such lease and all existing contracts and agreements of said parties of the first part." The context shows the intended meaning of the word "*assumes*." The par-

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ties use it in its original meaning, not in its acquired meaning. The defendant *assumed* such lease; it thus took to itself—accepted—the *obligations*, the contracts, and agreements, and the *benefits* of the *lessor* in that prior lease. These parties agreed that their lease was made having regard to the provisions of the prior lease. The obligations or the benefits of the prior *lessee* are not *assumed*; such obligations remain upon the party that agreed to fulfill them, and such party must now perform them for the benefit of the defendant.

The situation of the defendant is very similar to what it would be had the plaintiffs and defendant made their lease *first*, and after that the defendant had made the assumed lease with the company now operating that part of the road. Had this been done, no question could arise as to the basis for computing the rent due plaintiffs on their lease with the defendant; the plain language of the lease states a basis. The defendant, when it obtained these leases from plaintiffs, was seeking to extend its line of railroad from Pekin, in the state of Illinois, through Indiana, and to Springfield, Ohio; and it leased plaintiffs' property "so as to form a continuous line for the passage of cars, and thereby to increase its facilities for doing an east and west bound business, and to render more profitable the large amount of freight and passenger business it expects to bring to said Springfield."

The defendant took immediate possession of plaintiffs' roads east and north of Springfield, and made them parts of its extended system of railroads east and west and north. By the provisions of the lease assumed the part of the road from Springfield to Dayton had become part of a *trunk* road from the city of Cincinnati, by way of Dayton and Springfield, to Cleveland, Sandusky, and Columbus. The defendant thus acquired the benefits of a connection with, and interest in, a system of railroads extending south; and the *value* of such benefits need not be discussed. Thus it is conclusive that, by the provision, "the said party of the second part *assumes such lease* and all existing contracts

and agreements of said party of the first part," the defendant did not simply take the *obligations* of the lease assumed, but it did obtain the great *benefits* secured to the *lessor* therein. The defendant obtained these valuable benefits which it sought to secure, and all the control and possession it purchased and agreed for, with power to take full and entire possession and control of the remaining part whenever there is a failure to fulfill the covenants of the prior lease. And we see no reason why the true construction of this lease does not depend upon the *words* the parties have used in the lease.

The defendant agreed to pay "thirty-three and one-third per centum of the total gross earnings and receipts of said granted and demised railroads and property." And the lease describes the entire railroads and property. What are *gross earnings* and *receipts*? Surely they are not *net earnings* and receipts. It has been earnestly contended that the word "receipts" expresses something separate from earnings, and was intended to include only the thirty-five per cent rent paid under the prior lease. But the parties have not so expressed it in the lease; and, on final argument, the defendant admitted that, as the parties had used the words "gross earnings and receipts," these words may be taken together as expressing the same thing, unless other parts of the agreement require a different construction. We think this is the correct rule, especially to bind the defendant in its promises.

No other words of *this lease* can require such a separation and limitation of meaning. There are no provisions that the rent shall be gross earnings and receipts only of the parts operated by the defendant, and different for the parts not so operated. No one could claim such a result would follow should the defendant sub-lease the parts it now operates.

It is claimed "that in *several* places where the words *demise* and *grant* are used they are evidently used in a restricted sense, and apply to the parts of the roads not before leased;" and so "gross earnings" apply to all income

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except the rent from the part from Springfield to Dayton, and this rent was called "receipts." But it is not claimed that the words "demise" and "grant" were *only* so used in a restricted sense. And if the words "demise and grant" did not convey the entire line of railroads, including the part from Springfield to Dayton, what becomes of the defendant's *admitted right* to the possession and control of that part of the road when the prior lease shall be ended? The lease provides that the "gross earnings and receipts" are from the property and railroads "*demised and granted*" in the lease; and the language applies these words to the entire line.

We are asked to compare the provisions of the two leases, to find that the meaning of the word "*receipts*" is limited to the thirty-five per centum rent paid to the defendant. It must be conceded that the words "gross earnings and receipts," in the prior lease where no rents are received are used together and used to express one thing only. In that lease there are no receipts aside from the gross earnings, yet the parties there use the words "gross earnings and receipts" as the *basis* for computing rent. And these parties must admit they are so rightly used. We are asked to look at the covenants "as to keeping the accounts of the gross earnings and receipts, and the time of the payment of the rental," to aid in separating the word "receipts" from "gross earnings and receipts." In one case the original *lessee* or assign must keep the accounts and render a semi-annual statement; in this lease the *defendant* must keep the accounts; and every quarter the defendant must render an accurate *detailed* account. The original lessee need not render an account only each six months, but the account must show the quarterly business, as payments are required quarterly. So far as appears such accounts show the monthly business; and whether they do so or not, the defendant has agreed to render quarterly statements, and no one asserts it is not able to do so. So far there is no complaint before us that each party has not known the amount of gross earnings and receipts of each quarter. The exact amount of the first quarter, and the amount of the second quarter, seem to be well known.

As to *times* of payments, in this lease it is \$25,000 each month; and the quarterly remainder must be paid on the first days of January, April, July, and October, and thirty days grace is allowed. In the prior lease the time is within thirty days after the last days of December, March, June, and September. The quarters end substantially at the same time.

Again, it is claimed, the defendant's covenant to renew the tracks of the roads leased "with steel rails of not less than fifty-six pounds to the linear yard," could apply only to the roads in the possession and control of the defendant, as the defendant could not repair the road, and as no such provision is in the prior lease. But this claim overlooks a more important provision of each lease. In the prior lease the lessee covenants "in general that it will maintain said railroad in such condition and that it will operate the same and furnish such machinery, cars, equipments, stations, and *other appurtenances* as are *suited* and *required* by a railroad of the *best* description."

In this lease the lessee covenants that it will "furnish such equipments, stations, and *other appurtenances* therefor, as are *suited* for and *required* by a railroad of the *best* class." All agree that *steel* rails are *now* "suited and required by a railroad of the best description," and so the prior lease provides for such rails; and, in the future, rails of a quality much better than steel may be "suited for and required by a railroad of the *best* class." And when required they must be furnished under the prior lease, or the defendant, by virtue of the prior lease, may take possession of that part of the railroad and hold it under his lease with plaintiffs.

Thus the defendant has the power to fulfill every one of its covenants in this lease, as and when applied to the entire line of railroads, either by its own acts or by compelling another to act.

Whether or not either of these agreements is profitable is not before us. It does not appear that either one is not profitable.

We find nothing in either lease that requires the word

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“receipts” to be applied only to the thirty-five per cent rent paid under the prior lease to the defendant, or that should separate it from the expression “gross earnings and receipts,” as used and applied throughout both leases.

The parties here made but *one* lease. The defendant entered into its plain and specific covenants, knowing and accepting the provisions of the prior lease, with plaintiffs’ consent. The agreement to pay, as rent, thirty-three and one-third per centum of the total gross earnings and receipts of the granted and demised railroads and property is definite and distinct, and its meaning is not changed or limited by any words or covenant of either lease, or by any fact shown.

The plaintiffs were entitled to judgment as prayed for.

Judgment reversed, and judgment for plaintiffs.

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Corporations—Action to enforce statutory liability of stockholders—Appeal—Jurisdiction—Waiver—Parties—Continuance—Interest—Counsel fees—Liability of assignor of stock.

1. In a suit to enforce liability of stockholders, brought prior to the enactment of section 3260, Revised Statutes, by the creditor of an insolvent corporation, organized under the act entitled, “An act to enable associations of persons for building hotels and for other purposes, to become bodies corporate, passed April 5, 1866, as amended April 16, 1867,” in a county where some of the stockholders reside and are summoned, but not in the county where the corporation is situate and has its principal office or place of business, where the stockholders served out of the county in which the action is pending interpose a plea to the jurisdiction as to their persons, which, upon demurrer is held against them, and they then consent to a reference of the case to a referee for trial; appear at trial; after report filed, except to same; give notice of appeal to the district court from a judgment rendered against them; perfect the appeal to that court, and there, after consenting to a reference of

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the case to a referee for trial, and after report made to the district court by the referee, file exceptions to such report, it is too late to question the jurisdiction of the appellate court.

2. In such case (it having been shown that the indebtedness of the corporation is greatly in excess of the capital stock), where it is made to appear that a defendant, prior to the beginning of the action, had transferred his stock to a solvent holder within the jurisdiction, who owned it during the time a portion of the debts accrued, but who is not a party to the suit, it is not error to the prejudice of either stockholders or creditors for the court to adjudicate as between other stockholders who are parties and creditors, and continue the case for further proceedings as to liability of the vendor and vendee of the stock as between themselves, and as between them and creditors. Nor is the court's jurisdiction to determine the liability of such vendor at a subsequent term ousted, although the order of continuance does not in terms provide that the case is continued as to him.
3. In such case it is not error to include, in the judgment rendered, interest from the date of the beginning of the suit, although the amount of recovery may thereby exceed the stockholder's original liability.
4. In such case the court has power to order reasonable counsel fees to plaintiff's attorneys to be paid out of the proceeds of the judgments.
5. If, in such case, by reason of insolvency or residence without the jurisdiction, the amount due from any stockholder is not collectible, the assignor of the stock up to the time the liability attached, may be charged with the deficiency. *Brown v. Hitchcock*, 36 Ohio St. 667, followed.

ERROR to the District Court of Lake county.

On the 20th January, 1877, George W. Steele filed a petition in the court of common pleas of Lake county against The Little Mountain Association (corporation) and some forty persons as stockholders, some of whom resided in Lake county, alleging, among other things, the recovery of a judgment against the association, that it was insolvent, that the defendants (stockholders) were such stockholders at the time the indebtedness arose, and were indebted to plaintiff and to other creditors of the association for an amount equal to the amount of stock held by each respectively; praying the court to find who are the other creditors, the amount due the plaintiff, and to each creditor, which stockholders are solvent and within the jurisdiction, and which, if any, are insolvent or beyond the

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jurisdiction; also, that the court adjudge that each defendant pay the amount due from him, and that plaintiff, and the other creditors, have such full and ample relief as the nature of the case requires.

Service was made upon the association in Cuyahoga county, and upon divers stockholders in Lake, Cuyahoga, and other counties of the state. A joint answer on the part of the association and certain stockholders, who are plaintiffs in error, was interposed, alleging want of jurisdiction on the ground that the corporation was situate and had its principal office and place of business in Cuyahoga county. To this a demurrer was filed, which, being sustained, the defendants excepted and took leave to answer.

Issue being joined on part of some of the defendants (several creditors having also become parties and filed answers), the cause, by consent, was sent to a referee for trial. The parties appeared, and a trial was had before the referee. His report being filed, and exceptions thereto heard, and in part sustained, and in part overruled, a trial was had, and judgment rendered against the defendants (stockholders). From these judgments they severally gave notice of appeal to the district court, and in due time perfected their several appeals. The association did not appeal.

Among the facts found by the referee was that the sum of the debts was far in excess of the capital stock. This was at no time disputed.

In the district court, at the March term, 1881, by consent of all the parties, the cause was referred to George E. Paine, Esq., as referee and special master, to determine and report the liability of each of the stockholders, the amount of stock held by each, the time during which they held the same, and who, if any, are insolvent or beyond the jurisdiction. Also to determine and report who are creditors of the association, to whom the money recoverable is due and payable, and the amount to each, when the indebtedness to each accrued, and the amount which each of said stockholders, defendants, is liable to pay.

Subsequently, the death of the plaintiff being suggested,

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his executor, John W. Alexander, was made plaintiff, and the action was ordered to stand revived.

Due notice having been given, hearing before the referee was commenced on the 13th January, 1883, and adjourned from time to time until March 5th. At the adjourned hearing, February 3, 1883, counsel for the defendant objected to the further taking of testimony or proceeding further with the hearing on the ground that the estate of George B. Senter, deceased, was not before the court. Also on the ground that one S. A. Fuller, a stockholder, had not been made party. These objections were overruled, exceptions taken, and the hearing proceeded.

Report of the referee was made to the court at its March term, 1883. The referee found, among other things, that H. C. Blossom, one of the defendants, as alleged in his answer, filed February 15, 1877, held and owned \$500 of the stock from March 3, 1869, to the fall of 1872, when, on or before December 31, 1872, he assigned and transferred the same to one S. A. Fuller, who still holds and owns the same, and that he is within the jurisdiction of the court, has not been served with process, and is supposed to be solvent. Also that defendant, H. C. Nellis, acquired \$500 of stock February 28, 1872, and held the same until March 19, 1873, when he transferred it to one Calvin, who afterward transferred it to one Loomis, who is the present owner; that Loomis is insolvent and Calvin beyond the jurisdiction. By bill of exceptions, taken before the referee, it is shown that George B. Senter, a stockholder, who owned \$500 of stock, was deceased; that his executor, Grannis, who had been made a party and served, deceased prior to the hearing, and that the estate of Senter was not before the court or referee, though said estate was solvent and within the jurisdiction.

To the referee's report the plaintiffs in error filed divers exceptions (some of the parties appearing in the capacity of stockholders and some as creditors), among others, that the referee erred in overruling the objection to proceeding

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until Fuller was brought in ; that the referee erred in proceeding when the estate of Senter was not before the court. The case coming on for hearing upon the plaintiff's motion to confirm the report of the referee, and exceptions of stockholders and creditors, and evidence, the court sustained the exceptions as to the holding in regard to Fuller to the extent of directing that he be made defendant by supplemental petition and summons ; also as to the Senter estate by like direction, and thereupon the general exceptions were overruled, to which defendants excepted. Thereupon the defendants filed a motion stating objections to proceeding further until Fuller was made defendant, moved for an order compelling the plaintiff to make Fuller a party, and, if that should be overruled, then that they have order to make Fuller a party before taking further action, which motion was overruled and the court refused to order except as before ordered, to which defendants severally excepted. The court thereupon approved and confirmed the report except as modified, to which the defendants severally excepted. The defendants then, on leave, withdrew their answers to the merits, and the cause was heard and submitted to the court upon the demurrer to the answer to the jurisdiction filed in the common pleas. This demurrer was sustained, to which the defendants severally excepted. They then, on leave, refiled their general answer, and the cause was heard and submitted on the pleadings and testimony. The court thereupon found that the whole indebtedness was a sum much in excess of the capital stock ; that the defendants, stockholders (except Blossom), were liable as stockholders in several amounts as to each, which included interest from the commencement of the suit, and rendered judgment accordingly ; also ordered that from the sum to be realized from collection of the judgments the clerk pay the costs, including a counsel fee of \$1,000, to plaintiff's attorneys, and that the residue be paid to the creditors *pro rata*, according to the amount of their several claims as found by the referee. Thereupon, as to Fuller and the Senter estate, the cause was ordered continued for

further proceedings. No judgment for or against, or order of any kind, was made as to Blossom.

Separate petitions alleging error in the proceedings of the district court were filed in this court by stockholders and creditors, some of the latter class being also stockholders. They were heard and submitted together.

J. E. Ingersoll and Alvord & Alvord, for plaintiffs in error.

1. In an action to enforce the statutory liability of the stockholders of a corporation, *all* the stockholders must be made parties defendant. Rev. Stat., sec. 3260; *Umsted v. Buskirk*, 17 Ohio St. 114; *Wheeler v. Faurot*, 37 Ohio St. 26; *Bullock v. Kilgour*, 39 Ohio St. 543; Taylor Priv. Corp., secs. 725, 726; *Pollard v. Bailey*, 20 Wall. 520; *Terry v. Little*, 101 U. S. 216; *Eames v. Doris*, 102 Ill. 350; *Crease v. Babcock*, 10 Met. (Mass.) 525; *Grew v. Breed*, 10 Met. (Mass.) 569; *Hawkins v. Furnace Co.*, 40 Ohio St. 507.

2. A stockholder can not be held for an amount in excess of his stock, whether such excess be by way of interest, costs, or otherwise. Aside from the constitutional and statutory provisions making a stockholder liable beyond the amount of his stock for corporate debts, he is not personally liable to creditors for corporate debts. Taylor Priv. Corp., sec. 700; Thomp. Lia. Stock., sec. 4; *Seymour v. Sturges*, 26 N. Y. 134; *Carr v. Iglehart*, 3 Ohio St. 457; *Walker v. Lewis*, 49 Tex. 123. Such is the rule at common law. Hence the extent of the increased liability must be measured wholly by the constitutional and statutory provisions.

The policy of the legislation that the liability shall not be extended by implication is seen in section 3260 of the Revised Statutes, where it is provided that in an action to enforce such liability "no costs shall be taxed to nor collected of any stockholder to an amount which, together with the amount to be paid on said indebtedness, will exceed the amount of the stock on which he is liable." See upon this point, *Grund v. Tucker*, 5 Kan. 70, 79.

The adjudged cases are not numerous on this proposi-

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tion, but the following, we think, fully sustain our position: *Thomp. Lia. Stock.*, sec. 374; *Cole v. Butler*, 43 Me. 401, 405; *Crease v. Babcock*, 10 Met. 525, 568; *Grew v. Breed*, 10 Met. 569, 577; *Sackett's Harbour Bank v. Blake*, 8 Rich. Eq. (S. C.) 225, 233; *Burr v. Wilcox*, 22 N. Y. 551; *Munger v. Jacobson*, 99 Ill. 849.

3. An action to enforce a stockholder's liability must be brought in the county where the corporation has its principal office.

The corporation is a necessary party. *Umsted v. Buskirk*, 17 Ohio St. 118.

The legislature intended to make such an action local. Code Civ. Proc., sec. 48; Rev. Stat., sec. 5026.

The petition does not aver that all stockholders who are solvent and within the jurisdiction of the court have been made parties. All such stockholders are necessary parties. *Wheeler v. Faurot*, *supra*; *Bonewitz v. Van Wert County Bank*, 41 Ohio St. 78.

4. The legislature of Ohio has always been very reluctant to pass any law looking toward the payment of the attorney of the prevailing party by any sort of taxable fee to him. Such provision has been made, under certain restrictions, in partition cases, cases for the appropriation of private property, and in actions by a creditor to set aside a fraudulent conveyance. In no case is the idea favored that the court has power to set off a large portion of the fund realized, in a suit such as this, to be used in paying the attorney of the plaintiff. See *State v. Taylor*, 10 Ohio, 881.

Perry Bosworth and *J. B. Burroughs*, for defendants in error.

The fact that Fuller and the administrator of Senter were not parties first appeared on the hearing before the referee. The action had then been pending more than six years. No plea in abatement was interposed, nor was any motion made by any party to have them brought in until the hearing in the district court. Each stockholder and creditor had a right to intervene and by cross-petition or

otherwise become an actor in the case and bring in all proper parties. The plaintiff had no higher rights and owed no higher duties in that respect than any other party. By failing to ask that such parties be made, the plaintiffs in error have no ground of complaint.

No prejudice to any party appears. The total stock was but \$18,500 and the total debts \$39,578, so that a full duplication of the stock would pay less than fifty cents on the dollar of the debts. There was no contribution to be made from one to another to equalize burdens, and there was no equity to be adjusted between the present and the absent ones.

As to the question of interest: The liability of the stockholder does not spring entirely from, nor is it created wholly by, statutory enactment under the constitution. The constitution and statute create the liability, but the stockholder places himself under the liability by contract when he subscribes for or acquires the stock.

The statute imposes no liability upon him until by contract, express or implied, he voluntarily assumes the liability by taking the stock. The common law creates the liability for ordinary debts, but the debtor puts himself under that liability voluntarily by contracting the debt. In one case the liability is statutory, in the other common law, but the element of contract, the voluntarily coming under it by contract, express or implied, is the same in both cases. Without an assumpsit, express or applied, there is no liability in either case.

The obligation then rests upon contract as fully as any other debt and falls within the general statutes of the state, providing for interest on money due on contract. Rev. Stat., sec. 3181.

This view of the nature of the obligation is supported by *Hawkins v. Furnace Co.*, 40 Ohio St. 507; *Carroll v. Green*, 92 U. S. 509; *Corning v. McCullough*, 1 Comst. 58; *Baker v. Atlas Bank*, 9 Met. (Mass.) 182; *Commonwealth v. Cochituate Bank*, 3 Allen, 42; *Terry v. Anderson*, 95 U. S. 628.

The only real question is when did the obligation become

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due? It being an obligation contingent upon the insolvency of the corporation, it accrued when the contingency occurred and was ascertained.

To hold that the stockholder is not liable for interest would, in effect, offer him a premium of six per cent per annum to prolong the litigation.

Authorities are not abundant on this question, but the following are in point: *Wehrman v. Reakirt*, 1 Cin. Sup. Ct. Rep. 230-240; *Burr v. Wilcox*, 22 N. Y. 555; *Hooker v. Kilgour*, 2 Cin. Sup. Ct. Rep. 350.

As to the question of jurisdiction: The corporation is not complaining of having been sued in the wrong county.

The place for the action is determined by section 5031 of the Revised Statutes.

The stockholders are the real parties. Judgment and relief is sought against them only. The corporation is only one of many proper parties.

The right to sue a corporation is not conferred by statute; it is a common-law right. Hence the mode or place of proceeding is not a jurisdictional fact.

The allowance of attorney's fees was proper and lawful. *Trustees v. Greenough*, 105 U. S. 527; *Central Railroad v. Pettus*, 113 U. S. 117.

SPEAR, J. Attention is called to several alleged errors in the record: 1. That the district court had no jurisdiction of the person of the plaintiffs in error. 2. That the proper parties were not before the court when the judgment was rendered; and that a stockholder, served and in court, was relieved of liability, and no one charged in his place. 3. That interest was erroneously charged against the defendants below. 4. That fees were erroneously ordered paid to plaintiff's attorneys. 5. That under the facts as to Homer C. Nellis no liability existed against him. They may be considered in order:

First. For the purpose of making the question the demurrer of the plaintiff admits that the home of the Little

Mountain Association was in Cuyahoga, and not in Lake county. The association was a necessary party to the suit, although it was, in this case, but a nominal party, as no relief was asked against it. Therefore, the question whether the court of common pleas had, at the inception, jurisdiction of those parties who raised, by answer, the question of jurisdiction, depends on whether the corporation could be held to answer, in a case of this character, in a county other than the one in which it was situate and in which was located its principal office or place of business. We are favored with an ingenious brief to support the negative of this proposition. But we are inquiring rather as to the jurisdiction of the district court at the close of the litigation than of that of the common pleas at its beginning. To determine this question it is but necessary to keep in mind certain subsequent facts disclosed by the record. It will be noticed that every one of the plaintiffs in error, who sought to raise the question of jurisdiction in the common pleas, consented to a reference of the case for trial to a referee, and after rendition of judgment there, gave notice of appeal to the district court, and perfected his appeal either by the giving of bond in the amount directed by the court, or otherwise, in conformity to the statute. There, too, they consented to a reference of the case to a referee for trial, appeared at the trial, when his report was filed promptly interposed their general exceptions to it, and appeared and were heard upon them in the district court. True, they occasionally raised the voice of protest, but it was done incidentally, and not in a way to invoke action of the court until after the case had come on for trial. Can they now be heard to say that that court had not jurisdiction of their persons? We are not aware that the precise question, upon equivalent facts, has been judicially determined in this state, nor have we been able to find, outside of Ohio, a case presenting exactly this question. Adjudications in other states, however, are not likely to aid in its proper solution, because the practice in Ohio is essentially different from the practice in other states in removing

cases from general trial courts to appellate courts. While in many of the states, and perhaps in all except in our own, an appeal from a court of general jurisdiction is in the nature of a writ of error, whereby the appellate court passes upon the record, as to facts as well as law, does not hear additional or other evidence, but confines its adjudications to errors appearing upon the record, in Ohio the appeal itself vacates, without revisal, the whole proceeding as to findings of fact as well as law, and the case is heard upon the same or other pleadings, and upon such competent testimony as may be offered in that court. It takes up the subject of the action *de novo*, in respect to pleadings, necessary parties, trial and judgment, in like manner as if the cause had never been tried below. (For further discussion of these distinctions, see opinion of Swan, J., in *Grant v. Ludlow*, 8 Ohio St. 28.) The issues and questions, therefore, tendered in the appellate court are those presented as though for the first time, and it can make no manner of difference that the court below erred as to some preliminary questions, or indeed as to any question. As the issues are presented when the case gets to the appellate court, unless amendment be there permitted, the court takes them up and disposes of them. The question, therefore, of whether the common pleas had jurisdiction of the persons of the plaintiffs in error was not of consequence, provided the appellate court had such jurisdiction. Recurring to the record we find that the first move made in the district court by defendants was by those who were creditors to dismiss the appeal. This was for alleged want of jurisdiction of the action, not for want of jurisdiction of their persons. Then followed consent to a reference for trial, and the further steps already stated. Not until the case had proceeded to trial in the district court did they present to that court the question of jurisdiction over their persons. Independent of the question of the effect of taking the case to that court by appeal, it would seem that these parties had given the court abundant jurisdiction of their persons.

But we are not without authority, which, in our opin-

ion, bears upon the question. The case of *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563, approved in *Shafer v. Hockheimer*, 36 Ohio St. 219, is authority to the point that where, after judgment by default against a defendant not within the jurisdiction, the defendant appears in court to give notice of appeal, and has it entered, he can not be allowed afterward to deny the jurisdiction; that is, jurisdiction of the court below; and the reason he is held to have submitted to that jurisdiction is, that, by giving notice of appeal without questioning the jurisdiction of his person, he has entered an appearance. How different does a party stand in the appellate court, to which he has taken the case by appeal, where he, by consent to a reference, by motion and otherwise, makes an appearance there before he seeks to challenge the jurisdiction of that court as to his person. *Allen v. Miller*, 11 Ohio St. 374, is to the effect that where a defendant, in connection with a plea to the merits, interposes a plea to the jurisdiction as to his person, and that being first heard and decided adversely, then proceeds with the trial, is not thereby prevented from averring want of jurisdiction. At first blush this case might seem to be inconsistent with the holding in the later case, though the opinions are rendered by the same judge. But a reference to the language of the opinion, page 379, would appear to relieve it of seeming inconsistency. It is that "the defendant, Miller, embraced the first occasion which offered, to wit, in his answer, to assert his objection to the jurisdiction of the court, nor did he waive that objection by any subsequent act on his part." In the case of *Fee v. Big Sand Iron Co.* the defendant entered his appearance first and objected afterward, and that case is more nearly analogous to the case at bar. *Allen v. Miller* seems to rest upon the effect of making objection to the jurisdiction at the first opportunity. The present case is one where the defendants *did not* make objection to the jurisdiction at the first opportunity; but they appeared first and objected afterward. We do not perceive that *Allen v. Miller* is an authority against the position we are seeking to maintain.

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It will be borne in mind that we are not dealing with a case where the lower court had not jurisdiction of the subject-matter of the action, though, even in such case, if it be one where the appellate court would have original jurisdiction, and the party defeated below appeals to it and there appears, without objection pleads to the merits, and enters upon a trial, he can not afterward be heard to question the court's jurisdiction of the subject-matter of the action. *Harrington v. Heath*, 15 Ohio, 483; *Bisher v. Richards*, 9 Ohio St. 495; *Wood v. O'Ferrall*, 19 Ohio St. 427, and *Thomas v. Pennrich*, 28 Ohio St. 55. See also an important holding in *Adams Ex. Co. v. St. John*, 17 Ohio St. 641. *A fortiori*, if the question is one simply as to the person. And how, in principle, does such a case differ from one where the appellate court has rightful jurisdiction of the subject-matter by an appeal?

But why did not the appeal itself by these plaintiffs in error give the appellate court jurisdiction of their persons? They were not required to appeal. Had they desired to challenge the ruling of the common pleas upon their answer to the jurisdiction, and present the question so made to this court, they should have forborne an appeal, and proceeded by petition in error. The process is a simple one, and the remedy, if they had been wronged, would have been ample. By appealing they voluntarily took the case to the district court, and asked that court to try the case and adjudicate their rights, not upon questions of law alone, but upon all the facts and upon all the issues in the case. Why was this not, as to their persons, a voluntary appearance in that court, and how can they now say that that court could not do precisely what they asked it to do for want of jurisdiction of their persons? How can they be permitted to speculate on the chance of a favorable judgment, and then turn around and deny the jurisdiction as to their persons of the tribunal to which they have appealed and thus submitted their persons? Why should they be allowed to resort to that court, have their appeal docketed, compel all the other parties to follow the case there, and

then say to the court, we did not mean any thing; we were not in earnest about this; we are not in court, and you have no jurisdiction over us? See language of Read, J., in *Harrington v. Heath*, *supra*, p. 488; of Sutliff, J., in *Bartges v. O'Neil*, 13 Ohio St. 75; of Gholson, J., in *Bisher v. Richards*, *supra*, p. 498, and of Brinkerhoof, J., in *Wood v. O'Ferrall*, *supra*, p. 430.

It is unnecessary to consider whether, at the outset, the common pleas had or had not jurisdiction. The jurisdiction of the district court can not be successfully questioned.

Second. The complaint under this head is that S. A. Fuller, a stockholder, was not a party at the time the case was heard before the referee of the district court, nor when the decree under review was entered. Also, that the administrator of George B. Senter, a deceased stockholder, was not in court at the same time, and that Blossom, the assignor of Fuller's stock, was exonerated, and thereby the other stockholders were prejudiced.

As to the alleged error by reason of delay in making new parties. Should the plaintiffs in error now be heard to make this complaint? The case was ordered, by consent, to a referee in the common pleas, was by him heard and reported upon, and a trial and judgment and appeal followed, and yet no such objection was interposed. Again, at March term, 1881, of the district court, by consent of all parties, the case was referred to the gentleman who heard it as referee. The court's attention was not called to any defect of parties, although the record shows that the plaintiff in error, Blossom, and his attorneys, who also represented all defendants who objected before the referee and in the district court, and are now making complaint under this head, knew the facts disclosed by Blossom's answer as to Fuller's connection with Blossom in regard to the stock, and the record showed that Fuller had not been brought in. Blossom was a creditor of the corporation, as well as a stockholder, and with all other creditors had just as full right as had the plaintiff to bring Fuller in, and, if not content with the vigilance being exercised by plaintiff-

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iff, it was his duty then to inform the court of the condition of the record. The action was being prosecuted no more for the interest of the plaintiff than for that of every other creditor, except that the amount due plaintiff may have been larger than the amounts claimed by some of the others. Still another term of the district court intervened (March term, 1882) before the hearing to the referee commenced, and yet no sign was made to the court that other persons were necessary parties in the case. Not until the lapse of twenty-two months after the reference, and just as the parties had gathered for trial under an order of reference, consented to by these plaintiffs in error, did they make objection to further proceedings until other parties should be made defendants. This tardiness, apparently deliberate, is suggestive, at least, and the parties who were so slow to object when the absent ones could have been brought in without delaying the case, can not now well ask *special* consideration at the hands of the court. Unless it be made quite clearly to appear that they have been prejudiced in some *substantial* manner, a reviewing court will hardly give willing ear to their complaints, and interfere with the action of the trial court in the premises. We are not, in a case like this, inclined to search for unsubstantial and unimportant errors.

But, should this view be waived, does the record, upon the whole ground here being considered, show even technical error? It is urged that Blossom had the right to demand that Fuller, his assignee, should be present as a party, so that on that trial all his rights as respects Fuller and all of Fuller's rights might be then and there finally adjudicated for the very purpose of avoiding further litigation, for Fuller stands in the relation of indemnitor to Blossom; that no judgment was rendered against Blossom and he is out of the case; so that, if Fuller shall not be held, those shares of stock assigned escape assessment altogether, and that the action of the court in this regard was prejudicial to the rights of Blossom and of all creditors,

and was error. But is Blossom out? The assumption is that as no judgment was rendered against Blossom it was equivalent to a judgment in his favor, and that, as the journal entry is so drawn as to order a continuance as to Fuller and the Senter estate, and does not, in terms, order the case continued as to Blossom, he is necessarily out of court. With deference to the learned counsel, we can not concur in this assumption. If the case was continued at all it was, without question, continued as to Blossom in his relation of creditor. He therefore remained in for one purpose; why not for all other purposes of the case not before accomplished? No finding having been had or judgment rendered for or against him on the claim of plaintiff, the issue, as to him, was undetermined. Unless the defendants (stockholders) were jointly liable, so that a judgment against some would work a release as to the others, the judgment was not a final judgment as to Blossom in either relation; and if that be so the court's jurisdiction over him is not lost, for where jurisdiction is once acquired, unless the action be ended by the parties, the jurisdiction continues until final judgment in the case. *Bolles v. Stockman*, 42 Ohio St. 445. We know of no principle upon which it can be claimed that where the stock is held in severalty the statutory liability of stockholders to the creditors of the corporation is joint, nor of any practice that would warrant the rendition of a joint judgment. On the contrary, the case cited by counsel (*Umsted v. Buskirk*, 17 Ohio St. 113) is authority, were authority needed, to the effect that the judgments to be rendered are several, although the suit is prosecuted for the common and equal benefit of all the creditors. We conclude, therefore, that the district court's jurisdiction over Blossom was as unquestionable after the time at which judgments were rendered against his co-defendants as before. If error is to be discovered it must be found with reference to some other feature of the case.

It was proper, under section 5006, Revised Statutes, to bring in Fuller and Senter's administrator *de bonis non*, in

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order to a full determination of all the questions involved. But, under section 5013, Revised Statutes, in a case where no equities between stockholders were to be adjusted, why might not the court determine the controversy before it without prejudice either to the rights of those already in court, or of those yet to be brought in? The judgments rendered and to be rendered being several, if each stockholder liable at all was liable to the full amount of his stock, no reason is perceived why, by virtue of section 5311, Revised Statutes, the court had not full power to render judgment against one or more defendants, leaving the action to proceed against the others. Not only is this right given by statute, but it is well recognized practice in chancery cases. See *Dougherty v. Walters*, 1 Ohio St. 201.

This view is not in conflict with the cases of *Umsted v. Buskirk*, *supra*; *Wheeler v. Faurot*, 37 Ohio St. 26, and *Bullock v. Kilgour*, 39 Ohio St. 543, cited by counsel, when those cases are properly considered. It will be noticed that in *Bullock v. Kilgour* a judgment had been rendered against one of the defendants in 1870, for an amount certain, as being the extent of his statutory liability. In March, 1882, the plaintiff, by supplemental petition, sought to recover an additional amount upon a liability which existed when the first judgment was rendered, and the trial court gave judgment as prayed. This court held the first judgment to be a final judgment, and that the issue was *res judicata* between the parties. In the case at bar no judgment of any kind as to Blossom had been rendered. In *Wheeler v. Faurot* two defendants (stockholders) set up by answer that they had sold their stock to solvent purchasers amenable to process, and prayed that they might be made parties and brought in by summons. This the trial court refused to do. This court, recognizing the doctrine of *Umsted v. Buskirk*, to the effect that for the purposes of general account among the stockholders, and to enforce from them contribution in proportion to their shares of stock, and to a complete determination of all the equities involved, the other stockholders should be brought in, and that any de-

fendant had the right to insist upon their being made parties, held that the action of the trial court was erroneous, and reversed it. Here the district court did not refuse to have remaining stockholders brought in; on the contrary, it made an order to that effect. But there was no necessity that the case should be delayed on that account, for, as to all affected by the judgment, there was not, nor could there be, accounting or contribution between the stockholders, and the cases above cited are very far from being authority in support of the claim that, where such a condition of the case appears, the court's hands are tied, and it can do nothing until every solvent stockholder living and within the jurisdiction, and the representative of every one deceased, is brought in. The position would be different if it were necessary to order contribution, an adjustment of equities, and an equalization of burdens among stockholders. But that necessity, we have found, does not exist here. The liability of no stockholder against whom a judgment was rendered could possibly be increased or diminished by the disposition of the issues to be determined later. The debts of the corporation, as found by both referees, and not disputed, far exceeded the capital stock; so that, in any possible event, every stockholder that could be holden at all was liable for an amount equal to his stock. Nor can the creditors complain. They could as well share in the proceeds of judgments rendered against Blossom or Fuller, and the Senter estate, at a subsequent term, as though the amounts had been earlier ascertained; at most, delay could not aid them. We see nothing in the way of the district court, when issues should be made between Blossom and Fuller, adjudicating between them, and if it be found that Fuller is not liable, proceed to adjudicate as between Blossom and the creditors. Should Fuller not be held liable on final trial no prejudice would accrue to Blossom which could have been cured by a delay of the whole case; and as to effects of delay generally, as already found, he was as much responsible as any other party.

What might be regarded as proper practice under section

3260, Revised Statutes, we are not called upon to determine. That section having been enacted since the commencement of this suit, would not, under section 79, Revised Statutes, apply in this case. The plaintiffs in error were not prejudiced by the omission to render judgment against Blossom, nor by the refusal of the district court to delay, nor did the absence of Fuller, or Senter's representative, deprive the court of jurisdiction.

Third. It was held by the district court that interest should be charged against the stockholders as of the date of the commencement of suit. The contention on part of plaintiffs in error is that in no case can the stockholder be liable for a sum beyond the amount of his stock, to be determined at the time the liability is finally fixed by judicial decree. In other words, that the liability is one created by statutory enactment under the constitution, to be enforced by decree, and interest can not be added except by virtue of the decree of the court declaring the liability, and no interest can accrue against the stockholder until the liability is thus declared. On the other hand, the claim is that, while the liability is created by the constitution and the statute, yet the stockholder places himself under liability by contract when he subscribes for or acquires the stock; and, resting as well upon contract as upon statute, the interest follows the maturing of the obligation, which is at the time when the corporation becomes insolvent and refuses to pay.

We agree with the counsel that the question is one which, upon principle, is of very considerable difficulty. But we do not feel disposed to enter upon a discussion of it here, inasmuch as it was involved in the case of *Wehrman v. Reakirt*, decided in the superior court of Cincinnati in 1871, 1 C. S. C. R. 230, by Judge Taft, in a well considered opinion. It is stated by Judge Hagans, of that court, in *Hooker v. Kilgour*, 2 C. S. C. R. 350, that the case was brought to this court on motion for leave to file petition in error, which was refused. The district court, in holding the stockholders for interest after the commencement of the

suit, evidently followed the law of that case, and, inasmuch as it has been generally acquiesced in as furnishing the true rule, we are not prepared to say it is not the law in this state. The necessities of the case do not require us to go farther. Support for the proposition advanced by counsel for defendant in error will be found in the cases of *Corning v. McCullough*, 1 Comstock, 58; *Burr v. Wilcox*, 22 N. Y. 551; *Baker v. Bank*, 9 Metcalf (Mass.), 182, and *Terry v. Anderson*, 95 U. S. 628.

Fourth. As to the allowance of attorney's fees: It is urged that there was no power in the court to make any allowance at all. The proceeding was in equity. Its purpose was to bring into court a fund for distribution among creditors. Quoting from the brief of counsel for plaintiff in error: "The action is for the equal benefit of all the creditors. No one creditor can ever obtain any advantage or preference over the remaining creditors. All are to share in the fund recovered from the stockholders *pro rata*." The labor of the plaintiff's counsel being, therefore, for the equal benefit of all the creditors, why should the whole expense of attorney's fees be borne by the plaintiff? Should the other creditors, sitting by and observing counsel do work which inured as much to their benefit as to that of plaintiff, be heard to say that in good faith and fairness they should not contribute to a reasonable recompense? Indeed, there is much reason for the claim that the circumstances raise a presumption of a promise to pay on their part. But, however that may be, the court, in the exercise of its power over the fund, and in the discretion of doing full and exact justice to all the parties, had ample power to order paid from the fund reasonable counsel fees, the same as power to order payment of costs. It is insisted that such allowance is unfair to the other creditors, inasmuch as they were required to pay counsel for like services. Doubtless they were required, so far as they answered, to employ counsel for that purpose. Beyond this it is not perceived that any labor in the interest of creditors was performed by counsel other

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than those representing plaintiff. It happens that many stockholders were likewise creditors, and the same counsel appeared for them in both capacities. The proceedings bristle with evidences of their efforts in defense of the stockholders, but traces of their labors in behalf of creditors, as such, have some way been omitted from the printed record. We see no hardship. As to the amount of such allowance the trial court was in better position to judge what sum would be reasonable than is this court, and as no showing is made that the amount allowed was excessive, this court does not feel called upon to reduce it.

Fifth. As to Homer C. Nellis: This defendant disposed of his stock to parties who were insolvent, or beyond the jurisdiction. During the time he held it certain debts accrued against the corporation, and upon this showing a judgment was rendered against him for his proportion of the same. To hold this to be erroneous would require a review of the judgment of this court in *Brown v. Hitchcock*, 36 Ohio St. 667, a responsibility which we are not prepared at this time to assume. And discussion of the question is unnecessary.

Upon the whole case we are disposed to look at the alleged errors presented as technical, at best, and not substantial. And we are the more reluctant to disturb a judgment of this character because of the well known difficulty which surrounds the enforcement of the constitutional liability of stockholders for the debts of corporations. By reason of the great number of stockholders, the frequent transfers of stock, the decease of parties, and of other causes, delays—vexatious, expensive and almost interminable—seem to be inevitable in all such proceedings; so much so, indeed, that such liability has grown to be looked upon as furnishing next to no security at all for the debts of corporations. The present case well illustrates it. Commenced in January, 1877, it was not until March, 1883, that a judgment available to the creditor was reached.

Judgment affirmed.

Braiden v. Mercer.

BRAIDEN v. MEROER.

Guardian and ward—Settlement in probate court—Conclusiveness of as against sureties.

In an action upon a guardian's bond for the recovery of the amount found due the wards upon a final settlement of the guardian's accounts in the probate court, the sureties are concluded by the settlement, and will not be heard, in the absence of fraud and collusion, to question its correctness or to demand a rehearing of the accounts.

ERROR to the District Court of Belmont county.

Rees & Gallaher and L. Danford, for plaintiff in error.

C. W. Carroll and Alexis Cope, for defendant in error.

OWEN, C. J. In October, 1873, Milton W. Junkins was appointed guardian of the estates of two of his minor children. He gave bond, with Samuel Braiden, plaintiff in error, as surety, conditioned that his principal should "faithfully discharge all his duties as such guardian, as is required by law."

He entered upon the discharge of his trust. A considerable sum of money belonging to his wards came into his hands as guardian, which he neglected to account for.

He thereafter died, and in February, 1880, D. W. Cooper was appointed his administrator, and in February, 1881, as such administrator, and as required by section 6291, Revised Statutes, filed in the probate court of Belmont county an account of the doings of his intestate as such guardian. In June, 1881, the court passed upon this account and found that in his life-time the guardian, as such, had received of his wards' money \$953.48, which, with the interest thereon, amounted to the sum of \$1,384.06, which was adjudged against the estate of the late guardian, and ordered to be paid by the administrator to the then and present guardian, the defendant in error. There being no assets in the hands of the administrator, the action below was brought in the court of common pleas by the present guardian of the wards,

44	339
44	640
46	62

44	339
47	274

44	339
51	482

44	339
53	678

44	339
57	316

44	339
66	509

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against Braiden and the administrator of his principal upon the bond of the latter for the recovery of the amount found due from the estate of the guardian, and interest. To the petition, Braiden made answer as follows :

“ That the said Milton W. Junkins, as guardian, did not file any account of his trust as guardian ; that the account filed by his administrator was filed without the knowledge of this defendant, and this defendant was no party thereto. The defendant further says, that for many years prior to the death of the said Junkins, he, the said Junkins, was a man of intemperate habits ; that he was for a very long time unable to work ; that he had no real or personal estate, and no income except what he derived from his practice as a physician, when able to practice, and from an estate by curtesy he had in certain real estate ; that at the time he was appointed guardian his wards were infants of tender years, requiring great care and attention ; that they had in addition to the moneys claimed to have been received by their guardian the remainder in fee-simple of a piece of real estate in the city of Bellaire, Ohio, of the value of at least forty-five hundred (\$4500) dollars ; that while they were possessed of an estate as aforesaid, and their father and guardian unable to provide for himself, he, the guardian, did, at great cost to himself, support, clothe, and educate said children, and on them and in their behalf did expend large sums of money exceeding in the aggregate the amount this defendant is sought to be charged with, and that the said real estate of said wards is still held and possessed by them free of incumbrance. The defendant, Samuel Braiden, further says, that for a long time previous to the death of the said Junkins, he, the said Junkins, was not in condition to transact business ; that on that account he did not, in his life-time, claim or ask an allowance for the maintenance of his wards, nor did his administrator for him in the final settlement of his accounts.

“ The defendant further says, that the said Junkins was entitled to an allowance for maintaining, clothing, and educating his wards ; that his failure to do so was owing to

his condition as aforesaid ; and that said guardian was not in fact indebted to his wards in any sum at the time of his death, and that the said claim against him is not valid or equitable."

The plaintiff's demurrer to this answer was sustained, the defendant excepted, and, on his failure to answer further, judgment was rendered against him for the amount demanded in the petition. The district court on error affirmed this judgment.

To reverse the judgments below the present proceeding is prosecuted.

If Braiden was entitled to the relief demanded in his answer, the judgments below are erroneous and should be reversed.

The single proposition to which we address our consideration is the right of Braiden to a review, in the action below, of the finding and order of the probate court upon the settlement of the guardian's dealings by his administrator. Braiden was not made a party to, and it is assumed that he had no actual knowledge of, the settlement proceeding in the probate court. That the settlement was final as between the wards and their guardian's administrator, in the absence of an appeal from it or a proceeding to open it in accordance with the statutes, will be conceded. Section 6289, Revised Statutes; *Woodmansie v. Woodmansie*, 32 Ohio St. 18.

Whether a surety upon a guardian's bond is concluded by a settlement in the probate court of his principal's accounts has not, heretofore, been determined by this court. In *State v. Humphreys*, 7 Ohio (1 pt.) 224, it was held that an action against the sureties in a guardian's bond was sustainable without previous liquidation of the amount due from the principal. This case was explained in *Newton v. Hammond*, 38 Ohio St. 435, and the principle established that a right of action against the sureties first accrues to the ward for the amount remaining in the hands of the guardian when such amount is ascertained by the

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probate court on the settlement of the guardian's final account. It is said in that case by McIlvaine, J.: "The statement of accounts in the probate court must be verified by the oath of the guardian—a requirement alike important to the sureties and the ward." If the liability of the sureties is not fixed, nor they concluded, by the settlement, it is not apparent why the verification of the accounts is of equal importance to them and the wards.

The principle that a final settlement of a guardian's accounts and the determination by the probate court of the amount due his wards should, in the absence of fraud and collusion, conclude the sureties in an action against them upon the guardian's bond, finds strong support in both reason and authority. The sureties undertake that their principal will faithfully discharge his duties as guardian. Section 6259, Revised Statutes. With other duties the law requires him to render on oath to the proper court an account of his receipts and expenditures, verified by vouchers or proof, etc. . . . At the expiration of his trust fully to account for and pay over to the proper person all of the estate remaining in his hands. . . . To obey and perform all the orders and judgments of the proper courts touching the guardianship. Section 6269, Revised Statutes.

By their bond the sureties contract with reference to the action of a court and that their principal will obey its orders and conform to such action. Can they say they are strangers to such proceedings? Upon their principal's failure to obey the orders of the court there is clearly a breach of the bond. The relation they assume to such court and its action so far makes them privy to the proceedings affecting their principal as to deny to them the right, when called upon to answer for the breach of the bond, to call in question the grounds upon which the court based its action, and to have the same cause retried. We find in our law numerous illustrations of this principle. The sureties in an undertaking in attachment contract to pay the defendant all damages sustained by reason of the

attachment if the order prove to have been wrongfully obtained. Has it ever been doubted that the determination by the court in the attachment proceeding that the order was wrongfully obtained concluded the sureties upon that question in an action upon their undertaking? By an undertaking in replevin the sureties contract that their principal will duly prosecute the action and pay all costs and damages which may be awarded against him. Nobody will claim that the award of damages in the replevin suit is not final against the sureties in an action against them upon the undertaking. An undertaking in an injunction proceeding is conditioned to secure the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted. It has never been supposed that the sureties in an action against them could be heard to say that they were strangers to the injunction proceeding and that the decision of the court that the injunction ought not to have been granted should be disregarded and that question again litigated.

It is not easy to distinguish the principle involved in these proceedings from the one we are considering.

Indeed it may well be considered an established principle that whenever a surety has contracted with reference to the conduct of one of the parties in some suit or proceeding in court, he is, in the absence of fraud and collusion, concluded by the judgment. *Shepard v. Pebbles*, 38 Wis. 373; *Lothrop v. Southworth*, 5 Mich. 436, 448; *Towle v. Towle*, 46 N. H. 434; *Willey v. Paulk*, 6 Conn. 74; *Stovall v. Banks*, 10 Wall. 588; *Heard v. Lodge*, 20 Pick. 58; *Sturgis v. Knapp*, 33 Vt. 521; *Black v. Caruthers*, 6 Humph. 87; *Dowling v. Polack*, 18 Cal. 625; *Warner v. Matthews*, 18 Ill. 86; *Evans v. Commonwealth*, 8 Watts (Pa.), 398; *Garber v. Commonwealth*, 7 Pa. St. 266; *Watts v. Gayle*, 20 Ala. 817; *Casoni v. Jerome*, 58 N. Y. 322; *Douglass v. Howland*, 24 Wend. 35; *Braut Suretyship*, §§ 533, 534.

This principle was applied in an action on an injunction

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bond in *Lathrop v. Southworth*, 5 Mich. 448, where it was held that a surety was bound by a decree against his principal and could raise no question of its correctness. It was said in this case that the surety undertook that his principal should abide the judgment of the court. "He can, therefore, raise no question of the correctness of the decree, nor impeach it in this collateral proceeding." The same holding was made in a similar case—*Towle v. Towle*, *supra*, where the court say: "By signing the bond in suit with Towle, the plaintiff in the suit in equity, the sureties voluntarily assumed such a connection with that suit that they are concluded by the decree in it in the present suit upon the bond so far as the same matters are in question."

The supreme court of the United States applied the same rule to the sureties upon an administration bond, in *Stovall v. Banks*, 10 Wall. 583. It is there said that the surety "can not attack collaterally a decree made against an administrator for whose fidelity to his trust he has bound himself." The same application of this principle was made in *Heard v. Lodge*, 20 Pick. 58, where the court say: "To most purposes, it seems to us, that the sureties in an administration bond are, as well as the principal, estopped from controverting the validity of a judgment ascertaining the amount of a debt to be paid by the administrator. They are, in many respects, like the sureties in a bail bond, and equally bound by the proceeding against the principal. The duty they have assumed is that the principal will pay on demand all debts ascertained by judgment of a court of law against him in his capacity as administrator, if the estate be solvent. His failure to make payment is a breach of the administration bond." In the case of an administrator's bond, the court say, in *Casoni v. Jerome*, 58 N. Y. 322: "Sureties are bound by the decree of the surrogate in such a case, because by their contract they have made themselves privy to the proceedings against their principal, and when the principal is concluded,

the surety, in the absence of fraud or collusion, is concluded."

In *Shepard v. Pebbles*, 38 Wis. 373, it was held that the sureties on a guardian's bond are concluded by the order of the county court on the guardian's accounting, as to the amount due from him to the ward. Cole, J., said: "The general rule of course is, that a judgment is conclusive only as against parties and privies; but to this there are exceptions. And it is conceded that whenever the surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts, he is concluded by the judgment. . . . In the case before us, the order of the county court fixed the amount of the proceeds of the sale in the hands of the guardian, and directed its payment to the ward. The sureties had contracted that the guardian should and would justly account for the proceeds, and dispose of them according to law, and would perform all orders of the county court by him to be performed. There was a breach of the obligation on the default of the guardian to pay over as he was ordered to do; and the sureties, as well as the principal, are estopped from controverting the correctness of the order ascertaining the amount. They occupy, in many respects, a position like that of sureties in a replevin or bail bond, and are equally concluded by the proceedings against the principal." The strong analogy of this case to the one at bar is apparent. The settlement by the administrator of the deceased guardian is the same in effect as if made by the guardian himself. Section 6291, Revised Statutes. The amount due the wards was ascertained by the court and its payment to the plaintiff below ordered. In this default has been made. No fraud or collusion is alleged in the settlement, but a rehearing of the matter of the account is asked, as if no settlement had been made.

The only case cited by the plaintiff in error to support the claim that the surety may be heard to have a new accounting and settlement, is *Dawes v. Howard*, 4 Mass. 97. This was an action of debt on a bond of a guardian, the

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wards being minor children of the guardian. The guardian had made no claim in his life-time, but the court allows it to the sureties. There is no intimation in the report of the case that there ever had been a settlement of the guardian's accounts prior to the action upon the bond. The question we have considered was not suggested by court or counsel, and did not arise upon the record.

The more recent case of *Heard v. Lodge*, 20 Pick. 58, *supra*, presents the view of the same court upon this question, and fully supports the conclusion we have reached, which is, that in an action upon a guardian's bond for the recovery of the amount found due the wards upon a final settlement of the guardian's accounts in the probate court, the sureties are concluded by the settlement, and will not be heard, in the absence of fraud and collusion, to question its correctness or to demand a rehearing of the accounts. There was no error in sustaining the demurrer to the answer.

Judgment affirmed.

NEWBERRY v. ALEXANDER ET AL.

Corporation—Action to enforce statutory liability of stockholders—Consolidation of actions.

ERROR to the District Court of Lake county.

J. E. Ingersoll and *Alvord & Alvord*, for plaintiffs in error.
Perry Bosworth and *J. B. Burroughs*, for defendants in error.

BY THE COURT. The questions involved in this case are disposed of by the disposition of *Mason v. Alexander*, *ante*, p. 318, at the present term, except as to the matter of consolidation.

The plaintiff in error is administratrix *de bonis non* of Henry Blair, deceased. Elizabeth Blair, administratrix, was made party in the original case of *Steele v. The Little Mountain Association et al.*, in the common pleas, and duly served with process. In that court she joined in the con-

sent to refer the case for trial to a referee, and subsequently filed exceptions to the referee's report, but deceased before they were disposed of. Her death being suggested the present plaintiff in error was ordered brought in by summons. Before this was done judgments were taken against the other stockholders and the case as to them appealed. At a later term the plaintiff in error answered to the jurisdiction. This was found against her and a judgment rendered. From this she appealed to the district court. In that court, the original case still being pending there, at the March term, 1881, on motion, the two cases were ordered consolidated, and afterward were tried together.

We see no error in the order of consolidation. The two cases were properly joined at the outset, and their separation meantime, while it may have been an irregularity, did not so change the character of either as to prevent a joinder. The district court, having acquired jurisdiction of the person of the plaintiff in error, by the appeal and the steps taken to perfect it, and the two cases being in that court for trial, it was but the exercise of familiar jurisdiction to bring them again together, and no substantial prejudice accrued to the plaintiff in error by such consolidation.

Judgment affirmed.

44	347
51	346

WHITE v. WOODWARD ET AL.

Taxation—Assessment of penalties for non-payment.

ERROR to the Circuit Court of Clermont county.

Frazier & Raudebush, for plaintiff in error.

Alfred Yaple and John M. Pattison, for defendants in error.

BY THE COURT. Sections 2844 and 1053 of the Revised Statutes, when construed together, and with the exactness that all statutes imposing penalties should be, only author

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ize the imposition of a penalty of fifteen per cent on the non-payment of the taxes assessed and levied upon a tract or lot of land for the first default in the payment of the same; and do not permit the assessment of a penalty on the same taxes, or the penalty thereon, in any succeeding year or years by reason of the continued non-payment of such taxes and penalty.

Judgment affirmed.

44s 348
45s 306
46s 179

44s 348
47 476

44s 348
48 506

THE STATE *ex rel.* HERRON V. SMITH.

Constitutional law—Statute—Admissibility of parol evidence to impeach validity of adoption—De facto members of legislative bodies—Act of May 17, 1886—Governor—May be empowered to appoint municipal officers.

1. Where the journal of each house of the general assembly shows that a law received the concurrence of the number of members required by the constitution for its adoption, and that it was publicly signed in the presence of each house by its presiding officer, as required by section 17, article 2, of the constitution, its authenticity can not be impeached by parol evidence that one or more of the members in either house, recorded as concurring in its adoption, had, prior thereto, been seated, upon the determination of a contested election, by less than a constitutional quorum, although the concurrence of such member, or members, was necessary to the number of votes required by the constitution for the passage of the law.
2. The members so seated are, at least, *de facto* members of the house to which they belong, and the validity of the title by which they occupy their seats can not be inquired into by the courts for the purpose of affecting the validity of laws enacted by the legislature in which they hold seats.
3. The act of the general assembly, passed May 17, 1886, entitled "an act to establish an efficient board of public affairs in cities of the first grade of the first class" (83 Ohio L. 173), is within the legislative power conferred on the general assembly by section 1, article 2, and the requirement of section 6, article 13, of the constitution; and does not, by its provisions, vesting the appointment of the board in the governor of the state, impair any of the undelegated powers, which, by section 20, article 1, are declared to "remain with the people." Whether laws so

enacted for the government of cities and villages are wise or unwise, is left, by the constitution, to the wisdom of the legislature, and the courts have no power to hold them invalid although they may differ with the legislature as to the policy of such laws.

QUO WARRANTO.

The facts are stated in the opinion.

Follett, Hyman & Kelley and *Jordan & Jordans*, for relators.

The law creating the so-called board of affairs did not receive, in the senate, the concurrence, in its passage, of a majority of all the members elected thereto. Sec. 9, art. 2, Const.

Nineteen votes were requisite to give the act a constitutional majority in the senate; and of those recorded as having voted for the act, assuming to be senators, Hardacre, McGill, Kirchner, and Richardson were not members, because:

1. Brashears, Hopple, Kuehnert, and Wilson, having received certificates of election when the senate was organized, were duly qualified, and took their seats, and acted as senators, and were entitled to their seats at the time of the alleged passage of the act in question.

2. Hardacre, Kirchner, McGill, and Richardson, whose names appear as having voted for the act, were neither senators *de facto* nor *de jure*, but were merely usurpers.

Brashears, Hopple, Kuehnert, and Wilson, being in possession, could not be dispossessed by the action of any body except the senate, when organized under the constitution, with a quorum authorized to transact business. It is a well settled rule that, in all deliberative bodies, the majority shall govern. Sec. 6, art. 2, Const.; *State ex rel. v. Green*, 37 Ohio St. 234; *King v. Bellringer*, 4 Term Rep. 810; *Gosling v. Veley*, 4 H. L. Cas. 679; *Price v. Grand Rapids & I. R. Co.*, 13 Ind. 58; *People v. Supervisors*, 8 N. Y. 328; *Miller v. State*, 3 Ohio St. 483; *Fordyce v. Godman*,

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20 Ohio St. 17; Willcock Mun. Corp., sec. 546; Ang. & Ames Corp., secs. 127, 501, *n.*

Courts will explore the record to ascertain whether the proceedings of a legislative body have been in conformity with the constitution. *State ex rel. Loomis v. Moffitt*, 5 Ohio, 358; *Steamboat Northern Indiana v. Milliken*, 7 Ohio St. 383; *Fordyce v. Godman*, *supra*; *In re Roberts*, 5 Col. 528; *Legg v. Mayor*, 42 Md. 217, 218; *Walker v. Griffith*, 60 Ala. 367; *People v. Devlin*, 33 N. Y. 284; *People v. Purdy*, 2 Hill, 31; *s. c.*, 4 Hill, 390; *Thomas v. Dakin*, 22 Wend. 9; *Gardner v. Collector*, 6 Wall. 499; Sedgw. Stat. Law (2d ed.), 55.

We claim that there was no senate which could be in session for the transaction of business or the enactment of laws, or for the making of a journal. This is not merely a case where a legislative body, having all the constituent elements present, and having a constitutional quorum, passes a law which is *ultra vires*, or proceeds contrary to the rules and forms prescribed by the constitution. But it presents a case of defect of power and want of authority to act. See *People v. Supervisors*, 8 N. Y. 328; *Miller v. State*, 3 Ohio St. 483; *Price v. Grand Rapids & I. R. Co.*, 13 Ind. 58.

Is the court confined to the journal, the legislative record, and proceedings, where the question arises, as it does here, whether there was a senate at all; whether there was a constitutional quorum present; and whether the act was not an absolutely null and void thing for want of power and authority to pass it?

The presence of a quorum being necessary for the transaction of business, whether or not a quorum was present is a jurisdictional fact that may be inquired into in any other competent tribunal and shown by any competent evidence. "The jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings of the former are relied on and brought before the latter by a party claiming the benefit of such proceedings." *Elliott v. Peirsol*, 1 Pet. 328,

340; *Thompson v. Tolmie*, 2 Pet. 157; *Hickey v. Stewart*, 3 How. 750; *Rose v. Himely*, 4 Cranch, 241; *Thompson v. Whitman*, 18 Wall. 457.

"Acts done when less than a legal quorum is present, or which were not concurred in by the requisite number, are void." Dill. Mun. Corp., sec. 292.

In such case the court may resort to any source of information which, in its nature, is capable of aiding the judicial mind to arrive at a clear and satisfactory conclusion. *Berry v. B. & D. R. R. Co.*, 41 Md. 446; *Legg v. Mayor*, 42 Md. 217; *Town of South Ottawa v. Perkins*, 94 U. S. 261; *People v. Supervisors*, 8 N. Y. 328; *Price v. Grand Rapids & I. R. Co.*, 13 Ind. 58; *People v. Hatch*, 33 Ill. 123, 124, 163; *Fordyce v. Godman*, 20 Ohio St. 1; *Opinion of the Justices*, 52 N. H. 625; *State v. Green*, 37 Ohio St. 229; *Gardner v. Collector*, 6 Wall. 499; *In re Roberts*, 5 Col. 528; *Opinion of Justices*, 70 Me. 560; *Prince v. Skillin*, 71 Me. 361; *Sargent v. Webster*, 13 Met. (Mass.) 497, 504.

The law does not require the journal to show whether a quorum was present or not, and as it is silent on the subject we do not seek to contradict it; and we may go behind it and show there was no quorum. *People v. Hatch*, 33 Ill. 123, 124, 163; *State v. Green*, 37 Ohio St. 234; *Miles v. Bough*, 3 Q. B. 845; *Inglis v. Railroad Co.*, 1 McQueen, 112; Taylor Ev., sec. 1584; 1 Whart. Ev., sec. 69.

Courts will take judicial notice of the form of government, its political agents or public officers, the date and place of the sittings of the legislature, and all public matters which affect the government of the country. *Taylor v. Barclay*, 2 Sim. 213; *Opinion of Justices*, 70 Me. 609; *Prince v. Skillen*, 71 Me. 367; *Morris v. Harmer*, 7 Pet. 554; 1 Taylor Ev., sec. 16; 1 Whart. Ev., secs. 337, 338, n. 6; Cool. Const. Lim. *150; *Legg v. Mayor*, 42 Md. 203; *Gardner v. Collector*, 6 Wall. 499.

None of the numerous Ohio cases relating to the validity of the acts of officers *de facto* bear upon the question here, which arises as between the acts of two sets of persons

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claiming to hold the same office. To constitute an officer *de facto*, three things are necessary. (1.) A claim to be such officer. (2.) Fair color of right. (3.) Acquiescence by the public long enough to show a presumption that he had been elected or appointed. *Ex parte Strang*, 21 Ohio St. 610.

Wilson, Brashears, Hopple, and Kuehnert combined all of these elements as well as that of holding their offices *de jure*, and if the resolution unseating them was null and void by reason of a want of a constitutional quorum, they were, at the time of the adoption of the act under consideration, still *de facto* and *de jure* senators, and hence the act under consideration, adopted by the votes of those assuming to hold their seats, was void. See *State v. Francis*, 26 Kan. 724.

Where there is but one office there can not be an officer *de jure* and an officer *de facto* in possession of the office at the same time. *Boardman v. Halliday*, 10 Paige, 223; *Cohn v. Beal*, 61 Miss. 398; *McCahon v. Com'rs L. Co.*, 8 Kan. 437; *Morgan v. Quackenbush*, 22 Barb. 72; *McCrary Elec.*, sec. 517.

The legislature can not take from the people of a municipality the right to choose, directly or indirectly, their officers of local administration and confer such right upon the governor of the state. Cool. Const. Lim. 191, n. 1, 230, 237, 282, n. 1; Dill. Mun. Corp., sec. 58; *People v. Lynch*, 51 Cal. 15, 29; *People v. Hurlbut*, 24 Mich. 44; *Park Commissioners v. Detroit*, 28 Mich. 228; *Hubbard v. Springwells*, 25 Mich. 153; *Small v. Danville*, 51 Me. 359; *Western College v. Cleveland*, 12 Ohio St. 375; *Burch v. Hardwicke*, 30 Gratt. (Va.) 24; *People v. Mayor*, 51 Ill. 31; *Britton v. Steber*, 62 Mo. 370.

Jacob A. Kohler, attorney-general, for defendants:

The question presented by the motion is whether the investigation can be instituted into certain alleged facts existing, as is claimed, prior to the passage of the law in question

and wholly outside of the legislative journal, to show the law to be unconstitutional. In other words, the attempt is made to impeach the law by showing that certain senators voting for it were not in fact entitled to their seats in the senate, and that a conspiracy existed in the senate to set up a fraudulent senate and enact illegal laws.

No such inquiry can be made, and the facts alleged would be clearly inadmissible in evidence. The journal and the act itself may be looked to for the purpose of ascertaining whether the law was enacted in accordance with the constitution; but further than this the court can not go.

There are numerous cases to the effect that the enrolled act, signed by the presiding officer of the senate and house, and properly filed in the office of the secretary of state, is the ultimate and conclusive proof of its existence. *Eld v. Gorham*, 20 Conn. 8; *People v. Devlin*, 83 N. Y. 269; *Pangborn v. Young*, 32 N. J. Law, 29; *Green v. Weller*, 32 Miss. 650; *Evans v. Browne*, 30 Ind. 514; *Louisiana State Lottery v. Richoux*, 23 La. Ann. 743; *McCulloch v. The State*, 11 Ind. 424; *State v. Swift*, 10 Nev. 176; *s. c.*, 21 Am. Rep. 721; *Sherman v. Story*, 30 Cal. 258.

But the rule in Ohio is broader, and the court, in interpreting and applying statutes, may properly look beyond the printed volume and examine the journal for the purpose of ascertaining whether or not the law was duly enacted. *Miller v. State*, 3 Ohio St. 475; *Fordyce v. Godman*, 20 Ohio St. 1; *State v. Moffitt*, 5 Ohio, 359.

In numerous cases, in this country, attempts have been made to open the door to the introduction of parol proof and evidence *aliunde* the regular legislative record for the purpose of showing fraud, mistake, corrupt methods, illegal membership, want of quorum, etc., but in no case yet decided has this been permitted. *Opinion of the Judges*, 52 N. H. 622; *In re Wellman*, 20 Vt. 656; *Legg v. Mayor*, 42 Md. 203; *Osburn v. Staley*, 5 W. Va. 85; *State v. Platt*, 2 S. C. 150; *Moody v. State*, 48 Ala. 115; *Worthen v.*
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Badgett, 32 Ark. 496; *Southwark Bank v. Commonwealth*, 26 Pa. St. 446; *People v. Starne*, 35 Ill. 121; *People v. Mahaney*, 13 Mich. 481; *Supervisors v. Heenan*, 2 Minn. 331; *State v. Mead*, 71 Mo. 266; *Gardner v. Collector*, 6 Wall. 499; *In re Vanderberg*, 28 Kan. 243; *The State ex rel. v. Francis*, 26 Kan. 724; Cool. Const. Lim., sec. 135; Sedgw. Stat. Law, 54; Cush. Law Leg. Ass., sec. 2211; 1 Greenl. Ev. 491.

The question of membership belongs to the senate, and its determination is final. This court possesses no appellate or supervisory jurisdiction and can not review the proceedings of the body and adjudge that its acts were erroneous. Cush. Law Leg. Ass. 649; *Dalton, Clerk, v. The State ex rel.*, 43 Ohio St. 652.

J. W. Warrington, F. J. Coppock, and J. T. Harrison, for defendants.

Can the court receive parol testimony to impeach, not only the acts, but also the legality of the very existence of a senate whose organization and recognition as part of the government occurred before, and whose regular exercise of the ordinary functions of the senate of Ohio continued both before and after the date, of the statute in issue.

The effort of our adversaries to ignore the journal of the senate, or to supply what they claim to be omissions therefrom, is based solely upon the assumed absence of a quorum on the 8th of May. But this is collateral to the real issue involved. What is directly assailed by the pleadings is a statute which was passed by the senate, according to the journal, on May 14th, and which was signed and bears date of May 17th. The effort to ignore or change the journal of the 8th of May is necessarily collateral to the questions that arose of May 14th and 17th.

It is proposed to prove the want of a quorum on May 8th by parol testimony; but we insist that the real inquiry, from its very nature, is limited to the enrolled statute, in the office of the secretary of state, and the senate journal of the date of the passage of the act.

What sources of information are open to this court to

officially ascertain and determine as to the legality of the constitution of the senate? Is parol testimony admissible upon this inquiry?

In presenting their oral arguments in support of this claim our adversaries *assumed* the absence of a quorum.

The statement in the pleadings averring the absence of a quorum is in the fifth paragraph of the relator's reply. To that paragraph the defendants filed a motion to strike out. It is true that we stated to the court that if it were necessary, in order to raise the questions, they might consider the demurrer as filed to that paragraph of the reply. But this only suggests the conceded rule that a demurrer admits only such facts as are well pleaded, and as could be used as evidence on the trial. Hence, we must consider whether or not it is competent to offer parol testimony in support of the allegations contained in the fifth paragraph. If it is not, then clearly the motion is appropriate and should be granted. And even if a demurrer were treated as filed, and parol testimony is inadmissible, it clearly could not be treated as admitting the allegations. Hence, the pleadings do not admit the absence of a quorum, for the very question at issue is whether or not such testimony would be received in order to establish that fact.

Counsel here commented, at length, upon *People v. Hatch*, 33 Ill. 124-9; *State v. Green*, 37 Ohio St. 229, 235; *Gardner v. Collector*, 6 Wall. 499; *Price v. Grand Rapids & I. R. Co.*, 13 Ind. 58; *People v. Supervisors*, 8 N. Y. 317, 329; *In re Roberts*, 5 Col. 528; *Opinion of the Justices*, 52 N. H. 625; *Opinion of the Justices*, 70 Me. 560; *Prince v. Skillin*, 71 Me. 361-9; cited by counsel for the relators, and claimed that none of them involved or decided the question of the admission of parol testimony.

Parol testimony is not the best evidence. It would change, enlarge, and contradict solemnly prescribed records of a co-ordinate branch of the government. It would violate the most extreme rule which any court has ever adopted, in determining upon the existence or non-existence of a law, to wit, examining all relevant records of which they could fairly take judicial notice.

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Its logical results would require the court to assume jurisdiction of the election, returns and qualifications of legislative members, which has been expressly and exclusively vested in another and co-ordinate branch of the government. *Dalton, Clerk, v. The State ex rel.*, 43 Ohio St. 652.

It would be against public policy, in that it would require the court to treat as nullities not merely the acts of members of a co-ordinate branch of the government, but also the acts of the body itself, where such members and the body are acting under at least color of authority, and consequently *de facto* officers and a *de facto* senate, even if not *de jure*.

The constitution and the laws of Ohio prescribe the appropriate record evidence of the existence and acts of the legislative departments. Sec. 9, art. 2, Const.; sec. 17, art. 2, Const.; Rev. Stat., secs. 56, 128, 129; sec. 17 Joint Rules Gen. Ass.

The records required to be kept are more accurate than the recollections of witnesses. Such records have the sanction of sovereign adoption. From their very nature and object they are records as important as those of the judiciary. They therefore import absolute verity; they are the best evidence and can not be impeached by parol testimony. *State v. Moffit*, 5 Ohio, 359, 363; *Fordyce v. Godman*, 20 Ohio St. 1.

See also on the subject of receiving parol testimony, the following direct authority against it: *Andrews v. Inhabitants, etc.*, 110 Mass. 214; *Wise v. Bigger*, 79 Va. 269; *Division of Howard County*, 15 Kan. 214; *McCulloch v. State*, 11 Ind. 430; *Koehler v. Hill*, 60 Iowa, 543.

The silence of the journal as to the presence of a quorum raises a conclusive presumption that a quorum was in fact present; this presumption can not be rebutted by proof. *Miller v. State*, 3 Ohio St. 374, 384; *State v. Hastings*, 24 Minn. 78, 81; *Walker v. Griffith*, 60 Ala. 361; *In re Vanderberg*, 28 Kan. 243; *Ryan v. Lynch*, 68 Ill. 160; *County Worthen v. Badgett*, 32 Ark. 496; *Williams v. State*, 6 B. J. Lea (Tenn.) 549; *Brady v. West*, 50 Miss. 68, 80; *Osburn*

v. *Staley*, 5 W. Va. 85, 92; *State v. Mead*, 71 Mo. 266; Cool. Const. Lim. *136.

There are two rules in this country as to what evidence is admissible to authenticate the passage of a statute. One is according to the English doctrine, which is that it is not competent to go behind the parliamentary rolls; the other is, that it is competent to go behind the enrollment of the statute to the journal. There is no sanction or authority for receiving evidence beyond the enrollment and the journal; and these records are conclusive and binding upon the courts.

The following cases are to the effect that the enrollment is the sole and ultimate source of information as to the legal existence of the legislature, or the due enactment of the statute: *Evans v. Browne*, 30 Ind. 514; *People v. Devlin*, 33 N. Y. 269, 279; *People v. Commissioners*, 54 N. Y. 276; *Pangborn v. Young*, 32 N. J. Law, 29; *Eld v. Gorham*, 20 Conn. 88; *Sherman v. Story*, 30 Cal. 253, 258; *Louisiana State Lottery v. Richoux*, 23 La. Ann. 743; *Duncombe v. Prindle*, 12 Iowa, 2; *Koehler v. Hill*, 60 Iowa, 543; *State v. Swift*, 10 Nev. 176; *Speer v. Plank Road Co.*, 22 Pa. St. 376-8.

The following cases are to the proposition that the journal may be consulted, but in resorting to the journal nothing more is done than to examine it. No court has assumed to ignore it or permit it to be varied or contradicted. *Opinion of Chief Justice*, 52 N. H. 622; *Judicial Opinion*, 35 N. H. 579; *Wise v. Bigger*, 79 Va. 269; *People v. Mahaney*, 13 Mich. 481; *Osburn v. Staley*, 5 W. Va. 85; *Moody v. State*, 48 Ala. 115; *Grob v. Cushman*, 45 Ill. 119; *Ryan v. Lynch*, 68 Ill. 160; *Larrison v. Railroad Co.*, 77 Ill. 12; *Board of Supervisors v. Heenan*, 2 Minn. 330-6; *State v. Hastings*, 24 Minn. 78; *Burt v. Railroad Co.*, 23 Am. L. Reg. (N. S.) 534; *State v. Mead*, 71 Mo. 266; *The King v. Arundel*, Hobart, 109; *In re Vanderberg*, 28 Kan. 243; *Williams v. State*, 6 B. J. Lea, 549; *Walker v. Griffith*, 60 Ala. 361; *In re Roberts*, 5 Col. 528; *Brady v. West*, 50 Miss. 68,

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78; Cool. Const. Lim. 135; Whart. Ev., sec. 295; Sedgw. Con. Stat. 55; *Gardner v. Collector*, 6 Wall. 499.

The court may take judicial notice of the records. *People v. Mahaney*, 13 Mich. 492; *Wise v. Bigger*, 79 Va. 269; *Moody v. State*, 48 Ala. 115, 120; *Opinion of Judges*, 35 N. H. 578, 581, 583; *Division of Howard County*, 15 Kan. 194; Whart. Ev., sec. 295; Cool. Const. Lim. 103.

The charge of fraud is a direct attack upon the independence of the legislature, and to entertain it would be a usurpation of power totally subversive of the constitution. The authorities are abundant and conclusive against permitting any such interference with the legislative branch. *Slack v. Jacob*, 8 W. Va. 613, 634-7; *McCulloch v. State*, 11 Ind. 431; *Wright v. Defrees*, 8 Ind. 302; *Sunbury & E. R. Co. v. Cooper*, 33 Pa. St. 228; *Harpending v. Haight*, 39 Cal. 202; *State v. Hays*, 49 Mo. 604; *Commonwealth v. Leech*, 44 Pa. St. 333; *McCardle's Case*, 7 Wall. 506, 514; *Humboldt Co. v. Commissioners*, 6 Nev. 30; Cool. Const. Lim. 187, 188.

It is incompetent for the judiciary to inquire into the legality of the existence of the general assembly, for that would logically and necessarily lead to inquiry into the titles of members of the general assembly to their seats, which power is exclusively conferred upon the respective houses of the general assembly. Sec. 6 art. 2, Const.; *People v. Mahaney*, 13 Mich. 481; *State v. Harmon*, 31 Ohio St. 250; *Dalton, Clerk, v. State ex rel.*, 43 Ohio St. 652; *State ex rel. v. Hawkins*, 44 Ohio St. 98.

The acts of officers *de facto* are as binding as those *de jure*. *Ex parte Strang*, 21 Ohio St. 610; *State v. Carroll*, 38 Conn. 449; *Burt v. Railroad Co.*, 23 Am. L. Reg. (N. S.) 534.

The question raised by the objection that the act is unconstitutional because it confers upon the governor the power to appoint the members of the board provided for by the act, is not an open question in Ohio. *State v. Covington*, 29 Ohio St. 102; *State v. Constantine*, 42 Ohio St.

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442; *State v. Judges*, 21 Ohio St. 1; *Walker v. Cincinnati*, 21 Ohio St. 14; *State v. Hawkins*, 44 Ohio St. 98.

W. W. Boynton and *Thos. McDougall*, also for defendants, filed no briefs.

MINSHALL, J. On May 17, 1886, the general assembly passed an act entitled "an act to establish an efficient board of public affairs in cities of the first grade of the first class" (83 Ohio L. 173). It abolished the board of public works created by an act passed March 3, 1880, and, among other things, provided that the members of the board of public affairs should be appointed by the governor, and should have all the powers, perform all the duties and be the successor of the board of public works. The members of the board of public affairs for the city of Cincinnati, the respondents in this action, were appointed by the governor, qualified as required by law, entered upon the duties of their board and the performance of the same as far as they were permitted by the relators, and were continuing to do so, whereupon the relators, who constituted the board of public works of said city at the time of the passage of the act of May 17, commenced this proceeding, setting forth their title as members of the board of public works for the city of Cincinnati, and asking that the respondents should be required to show by what title they usurped the functions of the board of the relators, and that they might be ousted therefrom by the judgment of this court.

The respondents in their answer admit that they have assumed and claim the right to perform, the public duties that were heretofore incumbent on the relators as the board of public works of Cincinnati, but say that the act that created the board of the relators was repealed by the act of May 17, 1886, creating the board of the respondents, and that thereby the board of public works was abolished, and that the board of public affairs was made and became its successor, and that the performance of all its powers and duties was conferred on the board of the respondents; and

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ask that the relators may be restrained from interfering with them in the performance of their duties as such board of public affairs.

The relators reply, and in the first, second, third, and fourth paragraphs of the pleading, in substance deny (1) that the act creating the board of the respondents was, on the 17th of May, 1886, or at any other time, passed by the general assembly of the state, or that it ever became a law of the state; and (2) aver that, if it was passed, the legislature had no power to confer the appointment of the board on the governor, and that it is unconstitutional and void.

In the fifth, and last, paragraph, it is, in substance, averred that the adoption of the act of May 17th was the result of a conspiracy between the president of the senate and seventeen members, entered into for the purpose, among other things, of abolishing the board of public works and establishing, in the language of the pleading, "the so-called board of public affairs." That in pursuance of this conspiracy, while John O'Neill and nineteen other members of the senate were absent from the senate chamber, and while only seventeen members, less than a quorum, were present, the president of the senate, with the advice and consent of the seventeen members then present, in violation of the constitution of the state and the rules of the senate, corruptly caused the clerk of the senate to enter upon its journal a resolution that John Brashears and three others, naming them, were not duly elected, and that George W. Hardacre and three others, naming them, were duly elected and entitled to seats therein; that the vote was not taken by yeas and nays, and that the majority of the members were at that time temporarily absent from the state. That afterward, without being sworn, the four, so admitted, claimed to be members of the senate; and on the 17th of May, during the continued absence of the members before named, from the state of Ohio, the said pretended act of May 17, 1886, was declared passed and signed by the president of the senate; and it is then averred "that the president of the senate, the speaker of the house of representatives, and the secretary

of state, at the time of the signing and filing of said pretended act of the general assembly of the state of Ohio, well knew that the same had not been passed, but that the same was fraudulent and void;" and that there was at no time, from the 8th of May until the adjournment of the legislature, a quorum of duly elected members present in the senate to do business.

A demurrer has been interposed to the first four paragraphs, and a motion made to strike out the averments contained in the fifth one. The demurrer raises the question of the constitutionality of the law, and the motion, the validity of its passage.

1. If the facts averred in the motion may be considered by a court, on the question whether a statute, that appears upon the journals of both houses of the legislature to have received the requisite concurrence of their members, as provided in section 9, article 2, of the constitution, that is duly attested as a law by the presiding officer of each house, as provided in section 17, article 2, of the same instrument, and has been enrolled and filed in the office of the secretary of state as a law, as provided by statute, section 128, Revised Statutes, is not what it is thus authenticated to be, then this motion should be sustained, otherwise it should be overruled.

It seems to be well settled that courts will take judicial notice of all that is necessary to the authentication of a statute. It is said by Wharton, in his work on Evidence (section 295): "Courts will take judicial notice of the modes by which domestic laws are authenticated. Hence an English court is supposed to be judicially acquainted with the rules, practice, and prerogatives of parliament; an American court with the rules, practice, and prerogatives of the federal and state legislatures to which it is subject. So, as we have seen, a court will take judicial notice of the journals of a legislature to determine whether an act is constitutionally passed, or whether it has passed by reason of not having been returned in proper time by the governor." There is then no need of stating what appears upon the

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journals of a legislature relative to the passage of a law; such matters are judicially noticed without averment, and the same effect given them as if averred. Bliss on Co. Pl. 178. As no issue of fact can be taken upon what a court is required as a court to know, such averments in a pleading are redundant and irrelevant, and on motion should be stricken out. Pom. Rem., section 551.

Therefore, unless courts may hear parol testimony, offered to affect the passage of a duly authenticated statute, the matter contained in the fifth paragraph of the reply should be stricken out as redundant and irrelevant, as it appears from the journals of the two houses of the general assembly that this act received the requisite concurrence of the members, and was duly attested by the presiding officer of each house; and it has also been duly enrolled and filed in the office of the secretary of state, and published in the laws of Ohio. The journals of the legislature, the office of the secretary of state, and the published laws, show this; of all which, we take judicial notice.

Counsel have exhibited unusual industry in looking up the various cases upon this question; and, out of a multitude of citations, not one is found in which any court has assumed to go beyond the proceedings of the legislature, as recorded in the journals required to be kept in each of its branches, on the question whether a law had been adopted. And if reasons for this limitation upon judicial inquiry in such matters have not generally been stated, it doubtless arises from the fact that they are apparent. Imperative reasons of public policy require that the authenticity of laws should rest upon public memorials of the most permanent character. They should be public, because all are required to conform to them; they should be permanent, that rights acquired to-day upon the faith of what has been declared to be law shall not be destroyed to-morrow, or at some remote period of time, by facts resting only in the memory of individuals.

One of the earliest cases on the subject was that of *The King v. Arundel*, Hobart, 109. It involved the question

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whether a private statute had been enacted. The court there held that the act could only be tried by itself—its enrollment in the chancery, the chancery being then, as the office of the secretary of state is with us, the depository of the laws. The court said: "When the act is passed the journal is expired." Many cases follow this decision, adopting the attested enrollment of the law as conclusive on the question of its passage. *Pangborn v. Young*, 32 N. J. Law. 29, is an instructive case on the reason and policy of the rule. See also: *People v. Devlin*, 33 N. Y. 269; *People v. Commissioners*, 54 N. Y. 276; *Eld v. Gorham*, 20 Conn. 8; *Sherman v. Story*, 30 Cal. 258; *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743; *State v. Swift*, 10 Nev. 176; *Speer v. Plank Road Co.*, 22 Pa. St. 376.

But in many of the states, and without doubt in our own, the journals are to be regarded. They are required by the constitution to be kept. The language is: "Each house shall keep a correct journal of its proceedings, which shall be published, . . . and on the passage of any bill the vote shall be taken by yeas and nays and entered upon the journal; and no law shall be passed in either house without the concurrence of a majority of all the members elected thereto." Sec. 9, art. 2. Now in the time of Hobart the journals were not regarded as records; they were "remembrances for forms of proceedings to the record," that is to say, the enrolled bill.

In this state what appears on the journals affecting the passage of a law has been noticed by this court, but in no instance has attention been given to any thing not appearing upon the journals, though it be the omission of a requirement of the constitution.

In *Fordyce v. Godman*, 20 Ohio St. 1, the question was whether a certain statute allowing what is known as the "Morgan-raïd claims" had received the vote required by section 29, article 2, of the constitution, namely, two-thirds of the members elected to each branch of the general assembly. The law was held invalid, not by going outside of, but because it appeared from, the journal that the bill had not received the requisite vote. The attestation of the pre-

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siding officers is not, under our constitution, sufficient, in any case, to convert into a law a bill that has not received the requisite vote; for by section 9, article 2, on the passage of any bill the vote must be taken by yeas and nays, and entered on the journal; and if this be omitted the bill can not become a law, whether it receive the requisite vote or not. There is no such provision as to the seating or unseating of members.

In *Miller v. State*, 3 Ohio St. 475, one of the questions was whether the bill had been read on three different days in each house, as required by section 16, article 2. The court, Thurman, J., delivering the opinion, was inclined to treat the provision as directory, but said: "Whether the constitution, in the particular named, is merely directory or not, it can not be gainsaid, it seems to us, that where the journals show that a bill was passed, and there is nothing in them to show that it was not read as the constitution requires, the presumption is that it was so read, and this presumption is not liable to be rebutted by proof." And in *State v. Moffitt*, 5 Ohio, 363, it was determined by this court as early as 1832 that the journal can not be contradicted by parol proof. And so in *Koehler v. Hill*, 60 Iowa, 545, the supreme court of Iowa held that parol evidence is not competent to supply a correction in the record of the journal; that is to say, that an amendment to the constitution of the state submitted by one general assembly was the same in form and words as that agreed to at the subsequent assembly.

There are numerous cases in the decisions of the different states to the effect that the journals of a legislature may be noticed by courts on the question whether a bill became a statute or not. *Opinion of the Justices*, 52 N. H. 622; *Judicial Opinion*, 35 N. H. 579; *People v. Mahaney*, 13 Mich. 481; *Moody v. State*, 48 Ala. 115; *Grob v. Cushman*, 45 Ill. 119; *Board Supervisors v. Heenan*, 2 Minn. 330; *In re Roberts*, 5 Col. 528. The latter presents an extensive collection of the cases. But, as before stated, none are to be found in which the courts have, for any purpose affecting

the validity of a statute, gone beyond such permanent memorials of its enactment.

The case of *The State v. Francis*, 26 Kan. 724, is cited and relied on by counsel for relators. But it does not sustain them. There the house of representatives of Kansas had, by law, at that time, but 125 members; it had in fact 129. Four of these had by law no seats in the house, and could in no event be entitled to participate in its proceedings; they were simply supernumeraries. The journal showed that the concurrence of three, at least, of these supernumary members was requisite to the passage of the law in question, and that all of them voted for it. The court took notice of these facts appearing upon the journal, and of the further fact that, as a matter of law, the house then consisted of 125 members only, and held that the bill did not become a statute. In no case, however, is the rule that limits judicial inquiry in questions of this kind to the journals of the legislature, and excludes all parol testimony, more strongly stated. The language used is as follows: "In our opinion, the enrolled statute is very strong presumptive evidence of the passage of the act and of its validity, and that it is conclusive evidence of such regularity and validity, unless the journals of the legislature show, clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally. . . . If there is any room to doubt as to what the journals of the legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid; but in this state, where each house is required by the constitution to keep and publish a journal of its proceedings, we can not wholly ignore such journals as evidence." That the invalidating facts must clearly and beyond reasonable doubt appear from the journal is sustained by *Osburn v. Staley*, 5 W. Va. 85.

In *Evans v. Browne*, 30 Ind. 514, the proof, as offered from the journal, in connection with parol testimony, was to the effect that the act in question had passed

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the house after it had been reduced to less than a constitutional quorum by the resignation of forty-two of its members. The court refused to take notice of the averments, following the rule in those cases that adopt the attested enrollment of the law as the indisputable evidence of its authenticity. The case is an instructive one on the policy of the rule that rejects an issue of fact on the question whether a statute was adopted and became a law or not.

In *Wise v. Bigger*, 79 Va. 279, it was claimed that an act apportioning the congressional representation in that state, having been vetoed by the governor, had not repassed the senate by the requisite affirmative vote; that there were at least twenty-nine members present when the question was put, "shall the bill pass notwithstanding the objections of the governor," and that nineteen voted aye, and nine nay—the constitution requiring that it should be affirmed by two-thirds of the members present; but the court held that the journal did not show that there were more than twenty-eight present, and that it imported absolute verity. And to inquire into the veracity of the journal of the senate, in which it had recorded its proceedings, the court said "would be to violate both the letter and spirit of the constitution; to invade a co-ordinate and independent department of the government, and to interfere with the separate and legitimate power and functions of the legislature."

As to the averment that the passage of the act was part of a conspiracy, entered into between the president of the senate and seventeen of the members, carried into effect in the absence from the state of a majority of the members of the senate, it is sufficient to say that such suggestions have frequently been made for the purpose of inducing judicial inquiry into the conduct of legislative bodies, but the inquiry has as frequently been declined by the courts as not only indecorous, but as subversive of the independence of the legislature as a co-ordinate branch of the government. There is no authority for it in the constitution and laws of this state, and it is opposed to the practice and polity of our system of government. *Slack v. Jacob*, 8 W.

Va. 613; *McCulloch v. State*, 11 Ind. 451; *Wright v. Defrees*, 8 Ind. 298; *Evans v. Brown*, 30 Ind. 514; *Sunbury & E. R. Co. v. Cooper*, 33 Pa. St. 278; *Harpending v. Haight*, 39 Cal. 202. In *Miller v. The State*, 3 Ohio St. 484, it is said by Thurman, J.: "A disposition to disregard it (the constitution) is no more to be imputed to the legislative than to the judicial department of the government, and ought not to be imputed to either." "And," it is said by Cooley, "although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon." Const. Lim. *187.

The possible consequences of limiting judicial inquiry to what is shown by the journal is much exaggerated. It is not perceived how any limited number of members, without the acquiescence, or such indifference as would amount to acquiescence, of the majority, could make up a journal that would revolutionize the legislature and deprive the people of their duly elected representatives. The supposed case of less than a majority of this court causing a judgment to be entered of record is not *apropos*. For if it were done the only remedy would be in this court, for the reason that there is no other tribunal or department of the government that could afford one. And by parity of reasoning the only correction that can be made in a legislative journal is by the body that caused it to be made. The suggestion that fraud or bad motives in those who caused it to be made might defeat the remedy would apply to the one case as well as to the other. But confidence must be reposed somewhere, and why not in a legislative body, as to the keeping of its journals, as well as in this court, as to the keeping of its records? Besides, the people are the final tribunal before whom, as a rule, such delinquencies must be settled. Cooley's Const. Lim. *168. And, in the case of legislators, the return to the people being at comparatively short intervals of time, it is difficult to see how such

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abuses, if they exist, can be of very long standing. And in such cases it is "better to bear the ills we may have than fly to others we know not of."

2. The claim is, that the act of May 17, 1886, creating the board of public affairs, did not pass the senate and become a law, because, at that time, there was not a constitutional quorum in it; and this is based on the claim that there was none present on May 8, 1886, when the four members from Hamilton county were seated in the place of the four that were ousted. Now, if this were conceded, it does not follow that the act itself is invalid. No doctrine is better settled, in the jurisprudence of the English-speaking people, than that the validity of an act done by one in a public office or station is not, as a rule, to be tried by the title of the person to that office.

One of the best considered cases on the subject is that of *State v. Carroll*, 38 Conn. 449. It contains an exhaustive examination of the numerous cases in which the doctrine has been discussed and applied, and points out an error in the report of the case of *Rex v. Lisle*, as made by Strange, 1090, that, as is shown, has been the source of error in some of the subsequent cases. The result of the investigation made by the learned judge is, that competent authority in the appointing or electing body is not requisite to make a *de facto* officer.

The doctrine has been applied in a number of cases by this court. Thus, in *The State v. Alling*, 12 Ohio, 16, the appointment of a clerk of the court of common pleas, made by associate judges who were simply such *de facto* at the time of the appointment, having been previously legislated out of office by an act of the legislature, was held to be a valid one. This decision was made after the judges had been ousted from office on a proceeding in *quo warranto*. *State v. Choate*, 11 Ohio, 504.

In *State v. Jacobs*, 17 Ohio, 143, the appointment of a county treasurer by a board of county commissioners, two of whom were *de facto* commissioners only, their legal titles having been destroyed by the division of Auglaize

county, was held valid. The fact that they were recognized by the county auditor, who recorded their proceedings, and with the other commissioner, had the control of the books and papers, made, in the opinion of the court, a strong case of an officer *de facto*. In *Ex parte Strang*, 21 Ohio St. 610, the ground on which the sentence of an acting police judge was claimed to be invalid was, that the law under which he was appointed was unconstitutional. This question the court deemed it unnecessary to decide, for the reason, as stated, that if he was a judge *de facto*, his judgments would be as unquestionable by a proceeding in *habeas corpus* as if he were a judge *de jure*. It was then assumed that the legislature could not constitutionally authorize the mayor to appoint a police judge; but, as he was assuming to discharge the duties of the officer under the appointment, when he pronounced the sentence on Strang for a violation of an ordinance of the city, the court, after a full examination of the question in the light of the authorities, held that the acting police judge was a judge *de facto*, and sustained the sentence. White, J., delivering the opinion, said: "The true doctrine seems to be, that it is sufficient if the officer held the office under some power having color of authority to appoint; and that a statute, though it should be found repugnant to the constitution, will give such color."

It may then be asked, whether members of a legislature, seated by a vote of a number less than a constitutional quorum, have less color of title to their seats than a judge who holds his place by the appointment of one acting under an unconstitutional statute. In either case it may be said, there was no constitutional warrant for the act on which the title rests; and if the judgments of the one are valid, laws enacted by the body in which the others sit, and whose presence alone make a quorum therein, should also be held valid. Like reasons of public policy and convenience apply in either case.

In *Scovill v. Cleveland*, 1 Ohio St. 126, the validity of a certain assessment was questioned, *inter alia*, on the ground that the ordinance under which it had been made on the

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property of the plaintiff, was not passed by a number of legal councilmen equal to the majority of a legal council. To this Ranney, J., says: "We are still equally clear that, while they continued to act *de facto* in virtue of their election, their proceedings would be valid and binding."

If the validity of every law passed by a legislature were made to depend upon the existence of a quorum at the time of its passage in each house, whether the fact appears from the journal of the proceedings therein or not, the inconvenience that would result would be intolerable. *Evans v. Brown*, 80 Ind. 520. To the private embarrassments that would ensue in the matter of contracts and dispositions of property made upon the faith of what, by the public records, appeared to be a law, must be added the effect that would necessarily be produced upon the public credit. If such were the law, no loan could be obtained, short of the most ruinous rates of interest.

We observe that a number of public loans have been authorized by statutes passed since the 8th of May, 1886. Now if any of these loans have been made, can it be that the security of the public creditor must depend upon whether, as a fact, there was a quorum present in the senate on that day? It is difficult to perceive how it could be claimed that, if one statute is invalid because there was no quorum at that time, the same reason would not affect the validity of other statutes passed since the same time.

What appears of record is certain and accessible to all, and all may with reason be held to have notice of such matters; that which rests in parol is perishable, uncertain, and, in the nature of things, limited to the actual knowledge of a limited number. The necessity for certainty and publicity in the laws needs no higher reason for the exclusion of parol testimony, offered to affect their authentication, than the perishable and uncertain nature of such testimony.

The case of *Braid v. Theritt*, 17 Kan. 468, has been cited and relied on by counsel for the relators. It is not in point.

It was an action by Theritt to restrain Braidy, the alleged intruder, from interfering with him while discharging his duties as a member of the city council. It does not present, nor decide, that an ordinance passed by the vote of Braidy would have been invalid. The court was careful to confine its decision to the question of title arising between the two parties.

Nor is it in point on the question, as to whether the four members of the senate, seated by less than a quorum, if such was the fact, are not *de facto* members. Braidy intruded into the council by his own act, Theritt having been returned elected. Here the contestants were seated by the members present, acting as a senate, and it is this act of those present, exercising the functions of a senate, that gives at least a color, if not a legal title, to those seated.

We are, then, of opinion that the motion to strike out the fifth paragraph of the reply should be sustained; and, as the act appears from the journals of the legislature to have been duly passed, has been duly attested and filed in the office of the secretary of state, and has been published as a law, the writ must be refused, unless it in some way clearly contravenes the provisions of the constitution.

3. This question is raised by the demurrer to the reply. It is claimed that the law is unconstitutional, because it authorizes the governor to appoint the members of the board created by the act. It has been argued with great zeal and ability by counsel for the relators; but with due deference we think it can hardly be regarded as an open question in this state, since the decision in *The State v. Covington*, 29 Ohio St. 102, sustaining the act under which the respondents in that case had been appointed by the governor. That case was followed in *The State v. Baughman*, 38 Ohio St. 455, sustaining the law authorizing the court of common pleas to appoint police commissioners for the city of Xenia. The question was fully examined by McIlvaine, J., in the *Covington* case, and we are entirely satisfied with the reasoning upon which the judgment was

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placed. Ample power is conferred on the general assembly for the government and organization of cities by general laws; the legislative power of the state is vested in it by section 1, article 2, of the constitution; it is required by section 6, article 13, to exercise this power by the enactment of general laws for the organization of cities and villages, and it is, in the exercise of this power by the general assembly, that the entire system of municipal government for cities and villages has been created in this state. The entire details of the system that may be devised, and the public agencies that may be employed for administering it, and whether they shall be elected or appointed, is left by the constitution to the wisdom of the legislature.

The constitution expressly provides that certain officers shall be elected, and among these includes "such county and township officers as may be necessary" (section 1, article 10), and then in section 27, article 2, it is provided that the election and appointment of all other officers not otherwise provided for in this constitution "shall be made in such manner as may be directed by law." This is not only significant in itself, but seems to preclude the claim that there is any general spirit pervading the constitution, opposed to vesting the appointment of municipal officers in the governor or elsewhere. Whatever effect may be claimed for section 20 of the bill of rights, it can in no way affect the election or appointment of officers whose election is not provided for in the constitution. The power conferred on the general assembly to provide for the election and appointment of officers is subject only to the limitations imposed by the instrument conferring the power. "The true rule for ascertaining the powers of the legislature is," as stated by McIlvaine, J., in the *State v. Covington, supra*, "to assume its power under the general grant ample for any enactment within the scope of legislation, unless restrained by the terms or the reason of some express inhibition."

To this may be added what is said in *The State v. Constantine*, 42 Ohio St. 442, that "the manner of filling an office by

appointment is unrestricted, save only that it can not be by 'an election,' which is pointed out by the constitution as a different mode of filling an office."

Much reliance is placed upon certain cases decided by the supreme court of Michigan. The case of *Board of Park Commissioners v. Detroit*, 28 Mich. 238, has little or no application to this case. It involved the question only whether the legislature could compel a city to incur an expenditure, as for a park, against the consent of its council. Nothing of the kind is contemplated by this act. The board of public affairs may supervise and control the making of public improvements by the city, but it can not initiate or compel expenditures for such purposes without the approval of the city council.

It may act, and was probably designed, as a salutary check upon public extravagance, and may afford a wholesome administration of the affairs of the city.

The case of *The People v. Hurlbut*, 24 Mich. 44, is in point. It involved the validity of an act establishing a board of public works for the city of Detroit. The appointment was made by the legislature in the act creating the board. It seems there is no express inhibition in the constitution of that state against the appointing power being exercised by its legislature, as in our own (section 27, article 2.) The law was held invalid, not because it violated any express provision of the constitution, for it was admitted that it did not, but because it was thought to contravene certain principles of local self government, that the court by way of inference regarded as part of their system of government. And still another distinction was taken, resting upon mere inference, and much relied on in the subsequent case, between the public and proprietary characters of a municipal corporation. Supreme control by the legislature over its public character is conceded, while it is thought that in its latter character it has, or should have, the same independence in the management of its proprietary interests that is conceded to a private corporation. These distinctions are found to be illusory and without any well founded distinction in prin-

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ciple. 1 Dill. Mun. Cor., section 67. They have not been adopted to any extent by other courts. *People v. Draper*, 15 N. Y. 533, per Denio, C. J.; *Darlington v. Mayor*, 81 N. Y. 193; *State v. Seymour*, 35 N. J. Law, 47; *State v. Valle*, 41 Mo. 29; *Daley v. St. Paul*, 7 Minn. 390.

Well settled rules of construction forbid courts from assuming the liberty of declaring an act void because in their opinion it is opposed to a spirit supposed to pervade the constitution, but not expressed in words. In the language of Judge Cooley, "the courts can enforce only those limitations which the constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." Const. Lim. *128, *171.

Over the wisdom or policy of this legislation this court has no control. In the language of Judge Black, in *Sharpless v. Mayor*, 21 Pa. St. 162: "There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary." The remedy in such cases is with the people.

Being persuaded that this act in no way violates any provision of the constitution,

Writ refused.

OWEN, C. J., dissenting from the judgment, and especially from the action of the majority of the court in sustaining the motion to strike out the fifth paragraph of the reply, filed the following dissenting opinion:

The plaintiffs allege, in the fifth paragraph of their reply:

The act under which the members of the board of public affairs claim their offices is null and void; that the pretended passage, signing and filing the same with the secretary of state, is part of a conspiracy entered into between the president of the senate and seventeen members thereof; that such conspiracy was carried out by the parties to it in the following manner. (The names of the thirty-seven senators who were duly elected to the senate are here given.) It is alleged that on the 8th day of May, 1886, while nine-

teen members of the senate (naming them) were absent from the senate chamber, and while only seventeen senators, being less than a quorum of the duly elected senators, were present, the president of the senate, with the advice and consent of these seventeen senators, and in the absence of the majority of the senators, knowingly, unlawfully, fraudulently, and in violation of the constitution of the state and the rules of the senate, caused the clerk of the senate to enter upon what purported to be the journal of the senate, but which was not such in fact, the pretended adoption of a resolution, declaring that four of the senators—Brashears, Hopple, Keuhnert, and Wilson—were not duly elected as members of the senate, and not entitled to seats therein, and that Hardacre, Richardson, Kirchner, and McGill had been duly elected members of such senate, and were entitled to seats therein. That only seventeen senators were present and voted for such resolution, and the vote was not taken by yeas and nays, as required by the rules of the senate, and a majority of the senators did not vote, who were temporarily absent from the state, with the intention of returning, and with no intention of vacating their seats or surrendering their rights as senators; that the president of the senate and said seventeen senators (naming them) fraudulently and corruptly conspired and caused what purported to be the journal of the senate to be so falsely and fraudulently made and kept as to show that such pretended resolution had been adopted; that after this said Hardacre, Kirchner, McGill, and Richardson, without being sworn, claimed to have been admitted to seats as members of the senate; that in furtherance of such conspiracy, and during the continued absence from the senate of the nineteen senators, before named, the pretended act, of May 17, 1886, under which the pretended board of public affairs claims to have been created, was declared passed and signed by the president of the senate, and only seventeen senators were present or voted at the time of the alleged passage of such act and the signing of the same by the president of the senate, yet said pres-

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ident of the senate and seventeen senators corruptly and fraudulently caused the pretended journal to be so falsely and fraudulently made, kept, and signed as to show that the pretended act had been passed by the senate and signed by the president in its presence; that the president of the senate, speaker of the house of representatives, and secretary of state, at the time of the signing and filing of such pretended act, well knew that the same had not been passed, and was fraudulent and void; that at no time from May 5, 1886, until the alleged adjournment of the senate, was there ever a quorum of members present for the transaction of business; and that neither a quorum nor a majority of the members elected to said body ever assented or agreed to such resolution, or concurred in the passage of the pretended act, above mentioned.

There can be no serious discussion of the legal effect of a motion to strike out.

It is an admission, for the purposes of considering the questions involved, of the truth of the facts alleged.

The averments of this paragraph are equivalent to an offer to prove the facts so alleged. The legal effect of a motion to strike out matter from a pleading for irrelevancy was considered in *The State v. Harper*, 6 Ohio St. 610. Bowen, J., speaking for the court, said: "The 118th section of the code authorizes irrelevant matter, inserted in any pleading, to be stricken out on motion of the party prejudiced thereby. . . . The motion, in such case, took the place and served the office of a demurrer."

What is the office of a demurrer? "A general demurrer admits the truth of facts as stated in the pleading." McIlvaine, C. J., in *Mitchell v. Treasurer of Franklin Co.*, 25 Ohio St. 153. While it is true that facts not well pleaded, and mere conclusions of law, are not admitted by a demurrer, there is no pretense that the averments in this paragraph of the reply are mere conclusions of law, or that the facts are not well stated. The claim is that the facts stated, if established, would be immaterial, irrelevant, and constitute no valid ground of objection to the act in ques-

tion. To contend that these averments are not admitted by the motion because they are irrelevant and immaterial is to assume the very point in controversy. It follows that for the purposes of the questions raised by the motion it is admitted that the president of the senate and seventeen members entered into a conspiracy to subvert and evade a plain provision of the constitution of the state ordaining that: "A majority of all the members elected to each house shall be a quorum to do business; but a less number may adjourn from day to day, and compel the attendance of absent members," etc. Art. 2, sec. 6; and that this conspiracy comprehended a scheme to cause what purported to be, but was not, the journal of the senate, falsely to show such business to have been done as could not constitutionally be transacted under that provision of the constitution, which was sought to be subverted. That is, by these averments it is offered to prove, and by this motion it is admitted that a number of members less than a quorum, and who were wholly unauthorized to do more than adjourn from day to day and compel the attendance of absent members, fraudulently conspired to proceed with such unauthorized business, to vote out four members and vote in four other persons to take their places, and to cause a false and spurious journal to be so fabricated as to conceal the absence of a quorum, and thus to accomplish by a deliberate conspiracy against the constitution what its plain provisions expressly prohibited.

And this court is appealed to to ratify and sanctify this assault upon the constitution and upon representative government by declaring that the averments by which it is brought to our notice are irrelevant, immaterial, and scurrilous. How the proof was to be made does not appear. How far this pretended journal would establish it is not disclosed. It is idle to say that this court will take judicial notice of a senate journal; for no document purporting to be such journal has been before the court in any form, nor have we been made acquainted with its contents beyond what is disclosed in this reply; and intuitive knowledge of

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its contents will not be ascribed to the court or any member of it. It follows that the question of "going behind" the senate journal, which has so prominently engaged the discussion of this case, is not before us. By the averments of this reply there was no senate—simply a number of its members wholly without power to act. There was no senate journal, but a false and fraudulent pretense of one; and for aught that appears in this case, this pretended journal might, if offered in evidence or brought before us, be relied upon to establish, in part, the facts averred. It thus appears that the claim that these facts are immaterial because they would contradict a legislative journal is absurd; and the following language of Thurman, J., in *Miller v. The State*, 3 Ohio St. 484, which is cited by the defendants, has no application to the question before us. He said: "It seems to us, that where the journals show that a bill was passed, and there is nothing in them to show that it was not read as the constitution requires, the presumption is that it was so read, and this presumption is not liable to be rebutted by proof." He was here discussing the *mode* of passing an act prescribed by the constitution, as distinguished from the *authority* to pass it.

But this eminent jurist used, in the same case, the following language, which, in the light of the present case, seems prophetic: "By the term 'mode' I do not mean to include the *authority* in which the law-making power resides, or the *number of votes a bill must receive to become a law*. That the power to make laws is vested in the assembly alone, and that no act has any force that was not passed by the number of votes required by the constitution, are nearly or quite self-evident propositions. These essentials relate to the authority by which, rather than to the mode in which, laws are to be made." See *Fordyce v. Godman*, 20 Ohio St. 17, where this view is approved by Scott, J.

In the case at bar it stands admitted that there was no authority to do any business as a senate. The averment is that but seventeen senators voted for the act.

The attempt to sustain the act in question by the rule

relating to officers *de facto* is a palpable misapplication of a familiar doctrine. Among other cases relied upon is that of *Ex parte Strang*, 21 Ohio St. 610. It was there held that where an act of the general assembly in form authorized the mayor of a city to appoint a police judge, such appointee was a judge *de facto*, and that his acts were binding *when questioned collaterally*, although the act authorizing such appointment was not warranted by the constitution. It is declared in that case that "it is sufficient if he derives his appointment from one *having colorable authority to appoint*; and an act of the general assembly, though not warranted by the constitution, will give such authority." Here was the form of a law passed by the general assembly fully authorized to act, and in strict pursuance of its terms the appointment was made and the appointee proceeded to act. Here was certainly color of authority to appoint. But in the case before us there was not the slightest color of authority to constitute the persons members of the senate who are relied upon to give vitality to the act. Their title to their seats has never risen higher than a deliberate plot to circumvent a plain command of the constitution. But it must be remembered that the averment of the reply is that less than a quorum (seventeen members) were present when this act was passed.

There is another principle which is fatal to the view here contended for and adopted by the majority. There is no form of direct attack upon the authority of these pretended senators to act, recognized by the law. The present is the only available form of attack upon their proceedings.

Quo warranto would not lie to call in question their authority to exercise the functions of senators. The present is to be treated as a direct attack, for the reason that no other form of attack can be made. The principle is well established that where a direct attack upon a proceeding can not for any reason be made, it may be collaterally questioned. *Vose v. Morton*, 4 Cush. (Mass.) 31, and cases there cited.

In the case of the police judge there is no question but

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quo warranto proceedings would lie to oust him from his office, and for this reason, until this is done, his acts are binding as against collateral attack.

In *Opinion of the Justices*, 56 N. H. 570, the supreme court of New Hampshire was called upon for an opinion concerning the right of Priest and Proctor to retain seats in the senate. It was held that where the senate, in pursuance of its power to "judge of the elections, returns, and qualifications of its own members," have adjudged that a person claiming a seat as senator was duly elected and possessed of the requisite qualifications, their judgment is final, and can not be questioned by the executive or judicial departments of the government. But the opinion concludes with this very significant statement: "The foregoing opinion is based entirely upon the facts stated in the preamble to the resolution, and upon the assumption that when the senate undertook to act as final judges of the qualifications and elections of Messrs. Priest and Proctor *there was a constitutional quorum present.*"

It is noticeable that no case is cited by counsel, or by the majority, sustaining the view that acting members of a legislative body seated without authority are to be regarded as *de facto* members.

The authorities upon this question are well summed up in McCrary on Elections (sec. 517), where the able author says: "The cases in which the official acts or votes of members of a legislative body who are such *de facto* only, and not *de jure*, have been held valid, *are all cases in which there was no question as to the legality of the body in which they sat.* They are cases in which the body admitting such persons was, in doing so, acting within its admitted jurisdiction, and in such cases the courts will not inquire into the title of such members to their seats. The courts, in such cases, will go no further than to inquire as to the legal status and authority of the body as a whole," etc. The italics are the author's.

This effectually and conclusively disposes of all that has been said for the misconceived theory that an executed con-

spiracy between the presiding officer and a number of members less than a quorum of a legislative body to remove some of its members and induct other persons as members constitutes the latter *de facto* members of such body. It will be observed that the proceedings of the persons who assumed to be a senate are not attempted to be justified by the absence from the senate and state of a majority of the senators.

If seventeen members could transact such business so could seven, or any less number. Indeed, let it once be established that a plain provision of the constitution can be subverted or wholly disregarded by such means as it is here admitted were employed, and it is vain to speculate upon what may not be accomplished in an effort to contravene the organic law of our state.

In this case the court is called upon to consider a radically new question. It is creditable to the legislative departments of the states that no court of last resort of any one of them has ever before been required to deal with such a question. The industrious research of counsel has failed to produce a case, and it will be observed that not one is cited by the majority of the court, which tends in the slightest degree to support the extraordinary proposition which is here contended for. To apply the cases cited and relied upon it is necessary to assume an entirely different state of facts from those which appear in this case. Cases are found supporting the principle that courts will not inquire into the motives which prompted the enactment of a law. Their soundness will not be questioned. They all presuppose full authority to act. Here there was entire absence of authority.

If the position reached by the majority be tenable, these startling conclusions follow: When both branches of the general assembly, possessing undoubted authority to act, and acting in good faith, overstep in the slightest degree the limitations of the constitution in the attempt to enact a law, this court is clothed with abundant authority to overturn it and declare it a nullity; but where less than a quorum of a single branch, utterly without authority to act, by

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a scheme of conspiracy and fraud, unparalleled in the history of legislation, overthrow and disregard a plain command of the constitution, and cause a false, spurious, and pretended journal to make that appear which was not and could not be done, this court—the court of last resort in the state—which has ever been regarded as the last refuge of a broken constitution, is compelled to confess itself helpless and powerless to do more or less than ratify or sanctify the great public wrong by pronouncing upon it its solemn approval.

The fallacy of attempting to apply to this case the sentiment—sometimes mistaken for a principle—that the judicial department of the state owes entire immunity to its co-ordinate branches is obvious. There is no pretense that there was a senate authorized to act. One of the eminent judges constituting the majority, speaking for himself in a dissenting opinion in *The State ex rel. Dalton v. Richardson*, 48 Ohio St. 682, said: “It is a fundamental principle that every citizen and every public officer, however high his grade, is amenable to judicial control. It was but a few years since that the governor of this great state was arrested by the sheriff of an adjoining county and compelled to stand at the bar of the court, and plead as a common criminal. He did not claim nor could he claim exemption from obedience to the mandates of the court.”

This was a co-ordinate branch of the state government, not a mere usurper of its functions. No question of conspiracy to subvert the constitution was involved. So far as we are advised no question of irrelevancy, immateriality, or scurrility availed to prevent inquiry into the manner of exercising the executive functions of the state.

The cases which are relied upon to establish the sacredness of legislative journals from collateral inquiry or contradiction, all proceed upon the assumption that (1) there was authority to act and make a journal, and (2) there was a legal journal.

Here there was neither.

The contention that this conspiracy was so comprehen-

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sive in its workings—was carried to such extravagant limits and assumed such formidable proportions—that (though it be conceded that every step taken in its progress was over a broken constitution) it would create discord or disaster to call it in question now, is a novel argument.

Without questioning in the slightest degree the sincerity of conviction which has prompted the conclusion reached by the majority, it would be vain for the writer of this dissenting opinion to attempt an expression of his measureless regret that the disposition of this case has been allowed to rest upon the admission which, in legal effect, is involved in this motion to strike out. Whether the plaintiffs would have been able to prove the facts alleged in this reply it is idle to speculate. For the purposes of this case they stand as proved and established facts. But it was due to the people of the state; it was due to the presiding officer and these seventeen members of the senate, who are strangers to this proceeding and who have had no opportunity to be heard in a matter which so gravely involves their official conduct; it was due to them as eminent citizens and officials of the state, that this motion to strike out be overruled, and that the plaintiffs be called upon to prove the truth of these startling charges. If upon a hearing they had proved unfounded, all good citizens would rejoice. If they had proved true in fact, it is due the state and this court that the great crime against the constitution and against representative government be rebuked and redressed. But as it is, this unfortunate admission, and the announcement that there is no remedy in this court for the acts admitted, are left in this record—an abiding menace to our institutions—to breed popular distrust of the stability of our constitution, and of the power of this court to shield it from schemes and conspiracies to undermine and subvert it.

SPEAR, J. Although entirely satisfied with the majority opinion, in so far as it discusses the questions therein presented, in view of the importance of the case, and especially of its treatment by the chief justice in the dissenting opinion, I have deemed it proper to present a statement

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of the case as understood by me, with some views upon the questions involved, believing that such statement may contribute to a proper apprehension of the merits of the case itself, and of the action of the majority in the judgment rendered.

It is important, in preparing a statement of reasons for a particular view of a case tried and submitted to a court for decision, to keep in mind, with some care, the case actually submitted for the court's action. To do this to any purpose the proceedings at the trial are essential; and these will be particularly referred to further on.

The question which elicited the most controversy in the case at bar was as to the motion of the defendants to strike out the fifth paragraph of the reply of the relators. It has been assumed that by filing this motion the defendants have admitted the truth of all the allegations of the reply sought to be stricken out; this because a demurrer is said to admit the truth of the allegations of the pleading demurred to. I can not agree with this assumption. A motion is defined to be an application for an order. It performs an essentially different office from that of a demurrer. A demurrer raises an issue of law. The decision of a demurrer is a judgment. However the fact may be now, under the common-law practice, it contemplated a termination of the case. The demurrer was held to admit the matters of fact that were sufficiently pleaded because the party, having had his option whether to plead or demur, was taken, in adopting the latter alternative, to admit that he had no ground of denial or traverse. We need not stop to consider whether, under the present code practice, where the right to amend and to plead after decision of a demurrer is distinctly provided by statute and universally recognized, the iron rule of the common law ought to prevail or not, it is enough to say that such a result never was considered, under the common-law practice, as ensuing upon the determination of a motion. The decision of a motion is an order. It excludes the idea of a judgment. It is the written direction of a court, other than a judgment, and not

included in it. See *Darrow v. Miller*, 3 Code Rep. 241. A motion is largely addressed to the discretion of the court, and refusal to strike out is rarely ground of error. Very different as to a demurrer.

This motion is for an order to strike out the language of that paragraph as redundant, irrelevant, and scurrilous. The objection thus made is that a part is superfluous, and that the remainder is irrelevant because it can not be the subject of a material issue, has no bearing on the controversy, and can not affect the decision of the court. In other words, it is impertinent. In addition, it is scurrilous, in that it charges wrong doing upon the members of an independent branch of the government concerning a matter about which they can not in this case in any manner be made amenable to the process, control, order, or judgment of this court, and is therefore a charge not fit to be here made.

But, even if the motion had been treated as a demurrer, still no admission would have followed. In legal contemplation the journal of the senate (as to the contents of which and their legal effect we will see further on) would be before the court at every stage of the case, as completely before the court and a factor in determining all questions which might arise, as it could be had its contents been copied in full in the answer of defendants.

Further considering differences between demurrer and motion, this distinction may be observed: If the testimony in support of the allegation would be admissible, but yet, though proven, the facts would be insufficient, and amendment might cure, then demurrer is proper to raise the question; but if no testimony at all can be received in support of the allegations, and amendment would not help the pleading, then motion is proper. Now, in this case, the journal being before the court, no proof at all could be received to contradict, or add to, or vary it, and, as motives of legislators can not, in a proceeding of this kind, be assailed, motion was the proper mode of disposing of the irrelevant matter. An inquiry as to the truth of the charges

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would be useless, for, where no proof can, in any event, be received, it can not become important to consider at all the truth or falsity of the allegations.

That the case of *State v. Hooper*, 6 Ohio St. 608, does not in any way aid the claim that the allegations of the fifth, paragraph are admitted by the filing of the motion, will, I think, be apparent upon a careful examination of it. In that case, suit had been brought upon the bond of a county treasurer to recover a balance due from him upon settlement, which he refused to pay over. To the petition he answered that his residence had been forcibly broken open and the money stolen. The plaintiff moved to strike the whole answer from the files. The entire opinion upon this subject, of Bowen, J., is as follows: "The 118th section of the code authorizes irrelevant matter inserted in any pleading, to be stricken out on motion of the party prejudiced thereby. This made it competent for the court to strike out the defendant's answer, if the matters which it contained were irrelevant, and formed no ground of defense to the action. The motion, in such case, took the place and served the office of a demurrer. By the act of February 20, 1856, amendatory of the 101st section of the code, the plaintiff may demur to the answer for insufficiency, and this law necessarily supersedes the practice of moving to strike the answer from the files. The answer and motion in this case were filed before the adoption of the last named act, and are, therefore, not affected by it." By this language it appears that while prior to the amendment spoken of, motion was the proper paper for the plaintiff to interpose, after that amendment a demurrer only, in such case, would be warranted. It will be noticed, too, that this was a motion to an entire answer; not a motion to a reply, and to a portion of that only. It took the place of a demurrer in every essential particular. Upon its determination there was nothing in the way of a judgment for the plaintiff. Not so in this case. The motion went to a part only of the pleading, and upon its determination the demurrer to the other portion of the reply remained to be disposed of. It is impossible to see in this

case of *State v. Hooper* the slightest intimation, in language or by inference, that, under our present statute, a motion admits the truth of what the court is asked to order stricken out.

But "the averments of the paragraph are equivalent to an offer to prove the facts so alleged." Very well; then the motion is equivalent to an objection to the testimony. Such objection raises the question of relevancy, as well as other questions. In such case is the objector to be told that the making of the objection is an admission of the truth of the proffered testimony? If it be so, the unsuccessful objector is in a sad plight indeed. Having sought to obtain the judgment of the court upon his objection, which turning against him, his client is concluded as to the fact. I have not supposed this to be the law.

Again: By our statute, sections 5081 and 5129, Revised Statutes, allegations of new matter in a reply are to be deemed controverted by the adverse party as upon a direct denial or avoidance. In the face of the provisions of these sections the defendants are advised that, "for the purpose of this case, they (the allegations of the fifth paragraph) stand as proved and established facts." The statute itself having put the defendants in the attitude of directly denying those allegations, yet, desiring to anticipate, by a perfectly regular and usual mode, the offer of the testimony and the action of the court as upon objection to it, the parties are informed that, for every purpose of the case—impliedly in view of all moral, as well as legal, aspects of the controversy—those allegations "stand as proved and established facts." I most respectfully dissent from the position, and from the conclusion which this false assumption leads to.

In view of what actually occurred at the hearing, this assumption of admission works an injustice to the counsel for defendants; and, when the facts referred to are reviewed, it will appear that there is no ground in fact for this impression, nor for the equally erroneous one that the court is not in possession of the contents of the senate journal. The counsel were very careful to leave no room for such impres-

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sions. The argument of the case was opened by the attorney-general in support of the motion. He gave to the court, from a memorandum in his possession at the time, a *resume* of the proceedings of the senate for some time prior to the 17th of May, the day when the act in question, abolishing the board of public works and establishing the board of public affairs, was passed. By this statement it appeared that, in the contest between George W. Hardacre and three others, as contestants, and John Brashears and three others, as contestees, for the seats of senators from the county of Hamilton (which had been pending from a date anterior to the organization of the senate), a committee was appointed early in the session to take testimony and report. A large volume of testimony was taken by each side. One branch of the committee reported in favor of the contestants, another branch in favor of the contestees. These reports were presented on the 29th day of April. On that day, by resolution, the 5th day of May following, at 11 o'clock A. M., was fixed as the time for the consideration of the reports. The journal of that day showed that, upon a call of the senate, there was not a quorum present. The same fact appeared on the 6th and 7th days of May. On one of these days the president of the senate ordered to be issued to the sergeant-at-arms process for the arrest of the absent senators. The journal of the 8th day of May was silent as to the number of senators present. It shows that the report favoring the claims of the contestants was adopted, and that the senators thus found to have been duly elected and to be entitled to their seats were sworn and admitted. The journal of the 14th and of the 17th of May shows that the act in question was passed by the requisite number of votes, upon a call of the yeas and nays, as required by the constitution, and the due signing of the bill. To all this statement of the attorney-general as to the proceedings of the senate, as shown by the journal, there was no contradiction by opposite counsel. One of the gentlemen who argued for the relators—not one of the counsel of record—mistaking the language of the attorney-general as to the

proceedings of May 8th—understanding him to use the word “conceded,” whereas the word used was “contended”—assumed that he had stated that, as matter of public history, there was not a quorum of the senate present. This was a misapprehension. The attorney-general did not say that or any thing equivalent to it. On the contrary, the logic of what he did say imported the very opposite.

Later in the argument, another of the counsel for the defendants, having in his hand a certified copy of the journal, stated what appeared upon it on the dates in question substantially as before stated by the attorney-general, and no contradiction was made of the facts as he stated them. And thus the statement of facts regarding the senate journal stood until the closing argument, when the counsel who closed the case for the defendants reviewed the facts, as shown by the journal, substantially as had been done by his colleagues, and based his argument upon the journal, as thus shown. Still there was no contradiction as regards the contents of the journal. He also corrected the misapprehension of opposite counsel as to the claimed admission of the attorney-general, and that correction was not disputed. Nor was it claimed at any time by relators’ counsel, at the hearing, that the journal termed “a pretended journal” was a counterfeit of some other journal in the sense that there was somewhere a real, genuine journal, which, if produced, would disclose a state of facts different from those claimed by defendants, and of which the journal quoted from by defendants’ counsel was a spurious substitute, but simply that the book kept as a journal was a pretended one, because, as they claimed, the body itself was incapable of legally taking such action as the journal shows was taken, and because the journal did not truly show all it ought to have shown upon the date it purported to make a record of. It was at no time denied, neither could it be, that the body then in session, at least for some purposes, was a legal body. That it was legally in possession of the senate chamber; that the duly elected officers of the senate were present in the discharge of their

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duties, having all the books, papers, records, journals, etc., of that body rightfully in their possession and control, with unquestioned right to keep a journal—all of these facts were beyond dispute, and I have no recollection that any dispute of either of them was attempted.

The authority cited (Wharton) in the majority opinion supports the holding that the journal of the senate, being a public record of the proceedings of a branch of the legislative department of the government, did not need to be formally offered in evidence. It was one of which the court would take judicial notice, and the mode adopted of bringing its contents to the attention of the court was the usual mode, and so passed unchallenged. Further authorities in support of this position may be cited :

“ Courts are bound, judicially, to take notice of what the law is, and to enable them to determine whether all the constitutional requisites to the validity of a statute have been complied with, it is their right, as well as duty, to take notice of the journals of the legislature.” *People v. Mahany*, 13 Mich. 481.

“ The journals of the two houses of the general assembly are public records, of which the courts will take *judicial notice*, and if it appear from said journals that an act was not passed according to the forms of the constitution, it will be declared not to have the force of law.” *Moody v. State*, 48 Ala. 115.

“ The courts will take judicial notice, without proof, of all the laws of the state; and in doing so, will take judicial notice of what the books of published laws contain, of what the enrolled bills contain, of what the legislative journals contain, and, indeed, of every thing that is allowed to affect the validity or meaning of any law in any respect whatever.” *Division of Howard County*, 15 Kan. 194.

But, whether the senate journal should be taken judicial notice of in the same sense that public laws are so noticed, or whether (as is not doubted by any of the authors who treat of the subject) it should be treated as a public record ;

recognized as such by the court upon being produced without collateral evidence of its identity or genuineness, it is obvious that the result must have been the same in this case. The court was duly apprised of the contents of this journal, and having such knowledge it would be bound to take notice and give to the journal its legitimate and legal effect. An inquiry was addressed by a member of the court to counsel, asking what would be desired on the part of counsel in case the motion and demurrer should be sustained, and what in case they should be overruled? To the first, counsel for relators responded that they would offer nothing further, and that would end the case. To the second, that he presumed there would be no controversy as to the facts, and that counsel could probably agree on a statement of facts. To this counsel for defendants responded that they denied the allegations of fact as set up in the fifth paragraph, and that they would go to trial in the event of the demurrer and motion being overruled. Then, addressing opposite counsel, he remarked: "You do not claim that you could prove the allegations of the reply?" to which the counsel responded, in substance, "that he certainly did so claim." There had been present at the hearing several prominent members of the senate, known to have been subpoenaed by the relators as witnesses, and it is not unfair to presume that they had been so brought for the purpose of being called in case the motion to the reply should be overruled, and the case tried upon testimony. After the case was submitted, and the court had adjourned until a day in the following week, and the judges had retired to their consultation room, one of the counsel representing each side appeared in the consultation room, and the counsel for defendants then stated that he had a copy of the senate journal which he would leave if desired. Opposite counsel objected, and added, in substance, that if evidence were gone into they would show that the original journal of May 8th was lost. No consultation was had among the judges as to the suggestion, but one of the judges responded, in substance, that

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it was hardly necessary, and the counsel retired. I do not regard this interview as at all important, but give it as a part of what was said about the journal. Even if the original journal of May 8th were "lost," it probably will not be doubted that the senate had abundant power to supply it, or that the supplied journal would have all the efficacy of the original. Nor was it suggested that the certified copy used by counsel at the hearing was not taken from the original. It probably makes no difference.

In the light of the real case thus presented to the court, it can, it seems to me, hardly be claimed that in any sense was there an admission of the allegations of the reply as to conspiracy and unconstitutional proceedings; nor, upon due reflection, can it be concluded that the court was not made acquainted with the contents of the senate journal.

The denial of counsel referred to, in view of the unquestioned statements of counsel, implied a great deal. It implied that if the presence or absence of the requisite number of senators at a time antecedent to the passage of the law in question could be made the subject of parol inquiry at all, it would follow logically that the validity of official titles would be embraced and tried in the inquiry; that the opening of the door for testimony would lead directly to the question of who in fact were the duly elected senators from Hamilton county. The relators insist that it is the duty of the court to open up a question of evidence which inevitably points to an investigation of matters which a short time ago this court held, in *Dalton v. Richardson*, 43 Ohio St. 652, belonged exclusively to the senate; this is the logic of their position, unless, indeed, resort is to be had to the ever convenient field of assumption, and it is to be assumed in advance, that the certificates of election based upon the returns, shown and discussed in that case, or the temporary admission to seats under them, shall stand as conclusive proof and as clothing the possessors with a title *de jure* as against all the world. The query naturally occurs, how it is that if a court is without power to compel a correct return of an election

of a member of the legislature, as was held by a majority in the case above cited, how can it have power to determine that there was no quorum at a certain time on the ground that some of the members composing it were not elected? The constitution aims to deal with the substance and not with the mere form of an election. The language is "a majority of all the members *elected* to each house shall constitute a quorum," not of those who simply hold certificates. So that, if the court try the issue at all it would seem to be its duty to determine the ultimate fact, not which had certificates of election, but which were elected? How else can the court determine as matter of fact that there was or was not a quorum present in the senate when the law passed that branch of the general assembly? To state in different words one of the positions argued in the majority opinion: one not in fact elected, but who has received a certificate of election, may have a *statutory* claim to sit and act as a member, but he has not a *constitutional right* to do so. He may, indeed, be a *de facto*, but he can not be a *de jure*, member; and one who has been in fact elected, but who is without a certificate of election, is none the less a member *de jure* of the body to which he was elected. And it follows, as a corollary, that a majority composed in part of members who have been in fact elected, but, by reason, it may be, of frauds on the elective franchise, have been deprived of the statutory evidence of an election, is quite as much a quorum, within the spirit and meaning of our constitution, as one composed in part of persons holding only certificates of election. Members having certificates of election, but not in fact elected, though admitted to seats, are simply *de facto* members; their right to sit and act as members is derived from statute and the practice of legislative assemblies, but not from the constitution. It was as to one of the returns of this same election that the eminent chief justice said, in the opinion in the case above cited, that "if there was not behind it and in the preparation of it actual fraud and crime, there was at the best a reckless trifling with official duty, and with the rights of the honest voters of the

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precinct, as odious as actual fraud, and as dangerous as crime."

It may not be amiss, in this connection, to suggest that aside from the action of the 8th of May, there appears to have been no determination by the senate of the question which of the contending claimants were *elected*, and, for that reason, entitled to seats. Acting on the certificates of the clerk, who treated as valid the returns referred to, the contestants had been admitted pending the contest. The question of who were *elected* had not been passed upon. This action could hardly be deemed a determination of the ultimate rights of contestants and contestees; and, if not, then that question had not been settled unless the determination of May 8th should be recognized. The relators repudiate that action. So that, in the view urged by them, that question would seem to be still an open one. Therefore, upon this view, had the court disregarded the journal and held that whether a quorum was present or not on the 8th was to be determined as a fact, and, like other questions of fact, upon a preponderance of evidence, the court would have had to face that question, and determine upon the evidence who in fact were duly elected and entitled to seats. It would not do to say that the certificates determined that. There is no constitutional sanctity in a certificate of election. Such certificate is at best but a creature of the statute. It is not necessary to here express more decided convictions upon these mooted questions, but the suggestions of this paragraph serve to show what a Pandora's box would have been opened up had the relators' claim in regard to the right to introduce evidence to contradict the journal been sustained.

It will be borne in mind that there is no claim made in the reply that at the date of the proceedings attacked by the relators there did not exist a legal senate. The averments of the reply itself, where it speaks of the president of the senate and of certain members of that body, and charges them with forming a conspiracy, necessarily imply that such a body had an existence. There could not be a president of a senate which did not exist; there could not

be members of a senate which had no existence. The head and front of the charge, as regards inability to act—leaving out that which is verbiage and high-sounding declaration—is, that less than a quorum was present at the time of the acts complained of. This charge in a pleading necessarily suggests, at the very outset, the question of how the proof in its support shall be made; of how it can legally be made; of what is competent, by way of evidence, for the consideration of the triers. It is the starting point in the case. Any attempt to start elsewhere, or in any other manner, leads inevitably to the placing of the cart before the horse. We find the statute among those printed in the official volume of session laws of the general assembly. It purports to be one of the laws of the land. It purports to have been, and presumptively was, enacted in a legal and constitutional manner. This presumption stands until it is removed. The relators attack the statute and undertake to remove this presumption. Naturally, then, we ask, how do they propose to do it? The journal of the senate stands squarely across their path. One of the fatal fallacies which attends their argument, by whomsoever put, is to first assume that there was not a quorum present on the given day, and then brush aside the journal as so much waste paper, as the product of a collection of men having no capacity to act. This may be convenient, but it will hardly do.

As we have already seen, for all the purposes of the case, the journal of the senate is before the court; it is precisely as though it were a part of the record in the case, and unless the relators can show either that the journal itself supports their claim, or that they may be permitted to go behind and show by parol evidence, or at least evidence extrinsic of the journal, that their allegations of want of quorum and of conspiracy are true, they must inevitably fail. The first is not pretended. As to the other the logic of the unanswerable argument of the majority opinion is hardly assailed, and not a single adjudicated case is adduced in opposition to the long array marshaled in support of the propositions that the validity of the journal can not be

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questioned, and that all inquiry into the motives of members of the legislature "is subversive of the independence of the legislature as a co-ordinate branch of the government," "is opposed to the practice and policy of our system of government," and can not be entered upon. I venture the opinion that those positions are unassailable. Utterly fallacious is the assumption that the legality of public statutes is to be proven as an issue of fact, and so upon a preponderance of evidence. To hold that a court may go back of a legislative journal and hear parol proof contradicting the truth of its declarations, or contradicting the equally conclusive presumptions which follow, and the presumptions of regularity which attach to it, would involve the absurdity of "trying the validity of a statute upon the testimony of witnesses;" would be to hold that the adoption of a law rests upon evidence inferior to that required to attest the leasing or assigning of even the smallest and most uncertain interest in lands or tenements; inferior to that which may support a claim against one to answer for the debt, default, or miscarriage of another; inferior to that necessary to charge an executor or administrator to answer damages out of his own estate; inferior to that necessary to support an agreement made in consideration of marriage; inferior to that required to negative the presumptions which follow the possession of loaned goods at the expiration of five years; inferior to that required to prove a contract not to be performed within a year. The more one reflects upon such a proposition the more monstrous it appears, and the more peril seems involved in its application. It implies that where the existence or proceedings of a sovereign branch of the government are involved, parol evidence is the best evidence of which the nature of such a case is susceptible; it implies that records of the ordinary and appropriate character to prove public laws, or the existence and acts of official bodies, whose acts are not doubted or questioned by any other branch of the government, must, by the judiciary be ignored, or subordinated to oral proof. If these implications are to be followed as

law, and the courts can ignore the record evidence and official recognition of the present senate, what line would circumscribe the power of the judiciary? With what certainty could the judiciary itself determine upon what the law is? or what security could the subjects of the government have under and in respect of laws, if their existence and validity were made to depend upon oral evidence? For what difference in principle can there be between the passage of an act by less than a quorum of a senate whose membership is acknowledged and one a portion of whose membership is disputed? If the journal may be contradicted in the latter case, why may it not in the former? Public policy requires that the journal itself shall furnish the ultimate, conclusive proof.

Accepting the fallacious theory that the validity of laws may be determined by oral proof, as the rule in every day life would lead to inextricable and interminable confusion. To illustrate: a citizen, squaring the conduct of his business to meet the requirements of a given statute finds himself in litigation. The trial comes on and he seeks to avail himself of the statute. At once his opponent calls a member of the legislature which enacted the law, or a door-keeper, or a page, or a mere looker-on it may be, who remembers, or assumes to remember, that when the bill was put upon its passage there was less than a quorum present. True, the journal shows that the bill received the requisite number of votes. But the witness remembers that an interloper answered for an absentee, and thus the record was falsified. Having no oral proof to offer in opposition the party submits. The court, or jury, finds the law invalid, and the citizen loses his case. The next week, in another case, the same law is brought in question. Here no proof is offered to dispute its enactment and it is held valid and declared to be the law of the land. Or, a citizen is one day tried for violating a penal statute. No attack is made on the validity of the act declaring his conduct a crime, and he is found guilty and sent to the penitentiary. The next day, in the same court, a defendant,

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less scrupulous or more fortunate, shows by a witness that the act was not duly passed. The same law is, by the same court, held invalid, and the defendant is acquitted. To the legal mind could any thing be more absurd?

And when a question of conspiracy is being considered, how can such charge be more or less than an attack upon the motives of the several legislators? Is it any more than a charge of bad motives united in by several impelling to the act? If this may be a subject of judicial inquiry where the validity of the statute itself is involved, why may not every law upon the statute books be in like manner challenged, and why may not the courts of the state be asked to sit eternally and determine, by this test, whether each successive statute involved in trials is valid or not?

The case of *Miller v. The State*, 3 Ohio St. 476, referred to in both opinions, is of sufficient pertinency, particularly with reference to the proceedings of May 8th, to warrant further reference to it. Especially is the case authority upon the conclusiveness of legislative journals. In the opinion, Thurman, C. J., considers the constitutional provision, in reference to legislative proceedings, that "every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending shall dispense with the rule." The plaintiffs in error contended that that section had been disregarded by the assembly in passing the act under consideration, because the bill, having been so changed by amendment as to make it a new bill, had not thereafter been read on three different days. Concerning this, the learned judge, among other things, says: "Now, in the case before us, we have no means of knowing what was the change effected by the amendment in question. Neither bill nor amendment is spread upon the journal; and *unless we were to run into the absurdity of receiving parol proof and trying the validity of a statute upon the testimony of witnesses*, we could not say that any substantial change was made. For aught that we have before us, or can properly look at, the 'new bill' may have been, with the exception of a single

word, and that not material, identical with the matter stricken out. Nor is it to be forgotten that every reasonable intendment is to be made in favor of the proceedings of the legislature. It is not to be presumed that the assembly, or either house of it, has violated the constitution. . . . If it be said, as was said in the argument, that this leaves the assembly at liberty to disregard the constitution, the answer is obvious, that a disposition to disregard it is no more to be imputed to the legislative than to the judicial department of the government, and ought not to be imputed to either. The members of both departments take an oath to support that instrument, and we are not at liberty to assume that the sense of duty and of the obligation of an oath is weaker in the one than in the other. True, the courts are made the judges in the last resort of the constitutionality of all laws; and, as before remarked, where a statute is on its face plainly unconstitutional, it is their duty so to declare it; but it does not necessarily follow that they are authorized to supervise every step of legislative action, and inquire into the regularity of all legislative proceedings that result in laws."

In what possible way can this opinion be twisted into an authority supporting the relators' claim here when the eminent jurist declares the proposition to receive oral proof and try the validity of a statute upon the testimony of witnesses to be an absurdity? And when the very gist of the holding is expressed in the language which, for emphasis, is quoted above in italics, how can it be believed for an instant that Judge Thurman supposed in any case that as against a legislative journal parol proof could be received? However much this authority may be misapprehended here, its effect is not misunderstood elsewhere. The learned judge who delivered the opinion in the case hereinbefore cited, of *Division of Howard County*, 15 Kan. 194, cites *Miller v. State* to the point that legislative journals import absolute verity, and are conclusive proof as to whether any particular law passed the legislature and whether it is valid or not. And, applying Judge Thur-

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man's words, as quoted in the dissenting opinion to this case, it seems to us that where the journals show that a resolution was adopted, and there is nothing in them to show that there was not a quorum present, the presumption is that there was such quorum; and this presumption is not liable to be rebutted by proof. And, again, where the journals show that a bill was passed, and that it received the requisite number of votes in its favor, and there is nothing in them to show that those voting were disqualified, the presumption is that they were all qualified, and this presumption is not liable to be rebutted by proof. The judgment in this case was approved by the entire court, composed at the time, beside the chief justice, of Judges Ranney, Bartley, Warden, and Kennon. I have not the means of knowing whether the *syllabus* was prepared by the court or the reporter, but it is a thorough analysis of the opinion and judgment, and that which follows is more conclusive, if possible, upon this point than the quotation from the opinion above given. "For aught that appears in the journals of the senate and house of representatives of the general assembly, the act of May 1, 1854, . . . was constitutionally enacted. . . . Every reasonable intendment is to be made in favor of the proceedings of the legislature. It is not to be presumed that the assembly, or either house of it, has violated the constitution. . . . No bill can become a law without receiving the number of votes required by the constitution, and if it were found, by an inspection of the legislative journals, that what purports to be a law upon the statute book was not passed by the requisite number of votes, it might possibly be the duty of the courts to treat it as a nullity." Why limit with such care the question to be tested by the legislative journals if it were not intended to hold that those journals are conclusive, and that no proof in contradiction can be received? Is there any possible difference in principle as to the proof the court may receive whether the question is as to the presence or not of a quorum, or a question of whether or not the requirements of the constitution have been com-

plied with regarding the reading of a bill on three different days? In either case the question is one of evidence. Upon this view of the proposed evidence, of what avail would it have been for the court to overrule the motion, and then, when the testimony should be offered, rule that out? Should the court be asked to do a vain thing?

McCrary on Elections is referred to, and a portion of section 517 is quoted as sustaining the claim of the relators. In giving construction to language it is well to observe what the author is talking about. The author in this section is commenting upon the case stated in the preceding section, that of *Sykes v. Spencer*, pending in the United States senate, where each claimed to be the duly elected senator from Alabama; and, quoting substantially from the author, we find that two bodies had organized, each claiming to be the legislature, and each had elected a senator. The contest between the two legislatures depended upon this: In one body were eight or nine members who had received regular certificates of election, but who were conceded not to have been elected; while in the other was found an equal number of persons duly elected, but without certificates of election. To make a quorum of the former body it was necessary to count the persons holding certificates, but not elected, and to make a quorum of the latter it was necessary to count the members duly elected, but without certificates. The report of the election committee was made by Senator Carpenter, of Wisconsin, and is instructive reading. Following the view urged in the report "that all the forms prescribed by law for canvassing and certifying an election, and for the organization of the two houses, are designed to secure to the persons actually elected the right to act in the offices to which in fact they have been elected, it would be sacrificing the end to the means, were the senate to adhere to the mere form, and thus defeat the end which the forms were intended to secure," the senate held that the body having a quorum of members in fact duly elected should be regarded

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as the legislature of the state, and declared Spencer entitled to the seat. It had been contended that the six persons holding certificates should have been regarded as members of the legislature *de facto*, and their acts as such held valid, and it was in disapproval of this claim that the author (McCrary), uses the language quoted in the dissenting opinion. I fail to see how the citation is authority on that side.

It is urged in support of the claim that the motion to strike out should have been overruled and the proposed testimony admitted, that justice to the presiding officer of the senate and seventeen members of that body, flattered with the designation of "eminent citizens," required that the relators be called upon to prove the truth of their charges. It is not easy to treat this proposition seriously. If advanced in that spirit, I beg, with due deference, to suggest that the solicitude thus expressed for those "eminent citizens" is uncalled for, and that sympathy, if due to any of the persons referred to in the reply, belongs to others. However, I have not heretofore supposed that the practice of courts in Ohio warranted the overruling of a motion to strike out irrelevant matter in a reply for the purpose of giving persons not parties to the case the opportunity to call upon the pleader to make good his charges, or to be otherwise heard, although the matter "gravely involves their official honor."

Equally misplaced, in my judgment, is the sorrow expressed over an alleged "broken constitution," and as unauthorized the assumption that this court is, *par excellence*, the guardian and protector of that sacred instrument. The people are the protectors of their organic law. The legislature, as the direct representative of the people, its members chosen at frequent intervals, is as much its protector as any branch of the government, and it is only when a case is made involving the constitutionality of an act passed by that body, and presented to this court for its adjudication, that the court has any voice in passing upon consti-

tutional questions connected with legislation. In such case, where it is affirmatively and clearly shown, by competent evidence, that some requirement of the constitution was disregarded in the enactment of the law, or where some provision or provisions of the act violate the constitution *clearly, palpably, plainly*, and in such manner as to leave *no doubt* or hesitation in the minds of the court, the act may be declared a nullity; otherwise the court is clothed with no power to interfere with it. In no other sense is the court superior to the legislature. Because the court is composed of judges, who are presumed to be more or less learned in the law, it will not answer to assume that it is a body so much purer and so much wiser than the legislature as to warrant undue criticism by it of the acts of that body. This general subject is most ably treated in the opinion of the late learned chief justice of Pennsylvania, in *Sharpless v. Mayor*, 21 Pa. St. 162, cited in the majority opinion, and lack of space alone prevents extracts from it here.

The case before us involves no question of judicial control of any state officer. No such officer is asked to do, or not to do, any particular thing or any thing at all. Hence the reference to the language of the eminent judge who dissented in the case of *Dalton v. Richardson*, *supra*, has, in my judgment, no application. No one doubts but that where a proper case is made, one bringing an officer within the jurisdiction of the court, the court, operating within limits which the constitution and the laws prescribe, such officer can not claim that he is placed above the restraining authority of the law; but how this principle authorizes scurrilous matter against legislators in a pleading in a suit to which the persons so attacked are not and can not be parties, and in which the matter itself is relevant to no issue which is or can be raised between those who are parties, or is applicable to a question of disregarding or not the legal effect of a legislative journal, or to a question of the conclusive effect of evidence of the highest character as

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contrasted with that which is inferior, is entirely beyond my comprehension.

It is alleged that in the action of May 8th the senate disregarded its own rules. When the thing created becomes greater than the creator it may be worth while to consider this complaint.

It is contended that because *quo warranto* would not lie to call in question the authority of these so-called "pretended senators" to act, and because no other form of direct attack is provided, that the present form may be treated as a direct attack, and hence sustainable, upon the principle that where a direct attack upon a proceeding can not, for any reason, be made, it may be collaterally questioned, and *Vose v. Morton*, 4 Cush. 31, is cited. In this case the owner of land sought to be subjected to the lien of a judgment against his vendor, set up as defense that the judgment was invalid for want of jurisdiction. The judge who delivered the opinion announced as law that "it is a general and established rule of law that, when a party's right may be collaterally affected by a judgment, which for any cause is erroneous and void, but which he can not bring a writ of error to reverse, he may, without reversing, prove it so erroneous and void, in any suit, in which its validity is drawn in question," and, as the law of the case, the court held that "the tenant in a real action, brought to recover land levied on in execution of a judgment of the circuit court of the United States, in favor of the demandant against a third person, to which judgment such tenant is not a party or privy, is not concluded thereby from showing by proof that the judgment is erroneous and void for want of jurisdiction of the parties." I think that an examination of this case shows that the principles announced have no application to a case such as that under consideration, and most clearly it is not authority that such attack, whensoever it may be made, can be sustained by incompetent evidence.

In my judgment the conclusions reached by the majority are based upon sound principles; and any departure from

them would lead to confusion as to what the law is, uncertainty in its administration, and to other results of a most disastrous character.

FOLLETT, J. I concur in the dissenting opinion of Owen, C. J.

Other grounds of dissent need not be discussed, as the main question relates to the violation of an *express* provision of the constitution.

The *facts* involved in this case are historical, and they are known to the intelligent people of the state, and they are boasted of by the parties implicated and by their defenders.

Though but three months have passed since the majority holding was made in this case and their opinion was published, when we were notified there might be a reply to the dissent, it seemed *necessary* to bring forth the elaborate opinion of Spear, J., striving to ignore and, if possible, to get away from their own basis of facts for their holding, that this law is constitutional, although certain votes "*necessary to the number of votes required by the constitution for the passage of the law,*" were given by certain persons who were *seated* in the senate "*by less than a constitutional quorum;*" and that "*the members so seated are, at least, de facto members;*" as stated in propositions "1" and "2" of their syllabus.

This holding is based only upon such facts. If no such basis had been *presented*, no such holding could have been made.

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DAY v. RAILROAD COMPANY.

Water-courses—Deed of land on bank of river—Corporation—Dissolution—Reversion.

1. A general deed of premises lying upon the bank of a river, in which is constructed a canal, conveys the grantor's rights to the center of the stream bounding the property. And to reserve or exclude from the grant any such rights, the conveyance should contain proper words of such reservation or exclusion.
2. Where the canal company owning and operating such canal had the right only to use, for canal purposes, the bed and waters of such river, on ouster of such company from its corporate franchises and its dissolution by order of this court, the trustees winding up its affairs have no power to convey such rights, but they revert to the proper owners.

ERROR to the District Court of Portage county.

The Pittsburg, Youngstown and Chicago Railroad Company is a corporation under the laws of Ohio, and it was building its road through the village of Kent, in Portage county, Ohio. It was commencing to grade and build its road on property claimed by Day, Williams & Co. as partners, when, October 1, 1881, they, the plaintiffs in error, commenced an action against the railroad company and others to enjoin the railroad company from entering upon their premises until the right of way was duly condemned and paid for. The property is what was once used as a part of the Pennsylvania and Ohio canal, and it is in the bed of the Cuyahoga river, between the east bank and the middle of the river. In their petition plaintiffs averred that they owned the premises on the east bank of the river, which premises extended to the middle of the river, and that they were extensively engaged in the manufacture of glass on the property; that the use of the water of the Cuyahoga river was indispensable to their business; that it was impossible to carry on the manufacture of glass without said water; that it was not practical to obtain water elsewhere, save at enormous expense; that the construction of the railroad, as proposed, would deprive them of the

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use of said water, and necessitate the abandonment of their business, or the carrying it on at a loss—damage them many thousand dollars, and otherwise do them great and irreparable injury; and they prayed for an injunction and damages.

A temporary injunction was allowed.

On February 7, 1882, the railroad company set up in its amended answer:

That it admits the copartnership of the plaintiffs; that they are the owners of a glass factory property in the village of Kent, in Portage county, Ohio; that they purchased the same from Marvin Kent, by contract in writing, dated the first day of July, 1864, and received a deed thereof from Marvin Kent and wife, dated March 3, 1868, in pursuance of said contract and in fulfillment thereof; that the plaintiffs are engaged in the manufacture of glass, and that defendant is engaged in the construction of a line of railroad extending through said village of Kent.

The defendant denies that the west boundary of plaintiffs' glass works property is the center of the Cuyahoga river. Defendant further says that about the year 1840, a corporation duly created, organized, and then existing under the laws of Ohio by the corporate name of "Pennsylvania and Ohio Canal Company," and possessing under its charter full authority and right to construct, maintain, and operate a public canal and water highway for the transportation of persons and property through the county of Portage, in the due and legal exercise of its rights and franchises in and about the acquisition of its right of way and the construction of its canal thereon, duly obtained the right and legal authority to construct its canal in the Cuyahoga river through a portion of the township of Franklin, in the county aforesaid, in which plaintiffs' said premises are located, and did construct its canal in said river from a point several hundred feet northward of plaintiffs' premises, to a point several hundred feet southward thereof; that in and about the construction of the canal, said canal company, between the points aforesaid and oppo-

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site plaintiffs' premises, constructed its towing path in and along a portion of the original channel of said river and thereby diverted the stream so that all the waters thereof except that portion of the same used for the purposes of the canal ran and flowed along the channel of the river lying and being on the westerly side of the towing path, and the canal company constructed all and every part of the channel and bed of said river lying east of its said towing path and between the east line thereof and plaintiffs' said premises into a canal, and maintained, used, and operated the canal so constructed from that time down to the year 1872; that the construction of said canal in the manner aforesaid permanently changed and diverted the flow of the waters of the river to the west side of said towing path; that by reason of the acquisition of the right of way and portion of said river by the canal company and the construction of its canal thereon as aforesaid, cut off and appropriated all the water rights, mill privileges, and riparian rights and interests in, to, and connected with any and all lands lying on the eastern side of said river, including the premises of the plaintiffs between the points aforesaid

Defendant further says: That by the terms and provisions of its charter, the canal company took the fee-simple title to all the lands, rights, and interests so acquired by it for the purposes of the canal, and that all of its rights and lands are now owned and held by the defendant as hereinafter stated.

The defendant further says: That long after the construction of the canal as aforesaid, and while the same was being maintained and operated by the Pennsylvania and Ohio Canal Company under its rights, powers, and franchises, the plaintiffs purchased from one Marvin Kent all the lands and premises now owned by them, bounded and described as follows, to wit: Situate in Franklin township, Portage county, Ohio, and known as part of township lot No. 25, bounded and described as follows: Beginning at a point in the west line of Canal street, in said town of Kent, where a continuation west of the south side of Mill

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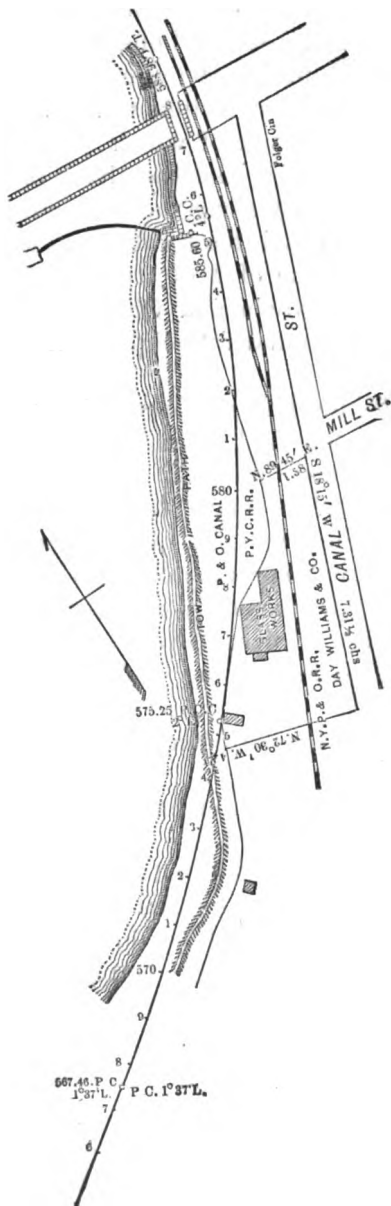
street crosses said Canal street; thence south $18^{\circ} 15'$ west seven chains and thirty-one and one-third links to a post in the west line of Canal street; thence north $72^{\circ} 30'$ west four chains and twenty-one links to the Pennsylvania and Ohio canal (the east bank of which is hereby understood to be what was formerly the east bank of the Cuyahoga river); thence northerly along the east bank of the Pennsylvania and Ohio canal to a point where the continuation west of said south line of Mill street intersects the east line of said Pennsylvania and Ohio canal; thence north $69^{\circ} 45'$ east one chain and fifty-eight links to the place of beginning.

That plaintiffs' deed from Marvin Kent, containing the aforesaid description and boundaries, carried the west boundary line of their premises to the east line of said Pennsylvania and Ohio canal; that they never had or held any riparian or other rights in, to, or concerning said canal during the time the same was maintained and operated, or since; and they never took, by the terms of their deed or otherwise, any title or ownership to any portion of the bed of the canal, or to any of the land over which the same was constructed.

The diagram on the following page shows the location of each part.

Second. For further answer herein the defendant says: That it is the owner of all the lands lying west of said former east bank and line of said Pennsylvania and Ohio canal, adjoining plaintiffs' premises on the west, that were formerly owned and occupied by said canal for the purposes of the construction, maintenance, and operation of the same by said canal company; that the defendant has the title thereto by virtue of a contract, in writing, between it and the New York, Pennsylvania and Ohio Railroad Company, dated the 19th day of July, A. D. 1881, said last named company having title thereto by virtue of conveyances from the trustees of said canal company, duly executed and of record in the county of Portage; that the east line of the premises so purchased and owned by defendant is the east line

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of the berme bank of said canal on and along plaintiffs' premises; that the line of defendant's railroad is located and fixed entirely on its own land, lying west of said line, and in no place or part does it touch any land of the plaintiffs, or in anywise interfere with or affect the same, or any buildings or structures thereon; and the defendant has the complete right to enter upon its said premises and construct its line of railroad in the legal exercise of its franchises and powers.

In the reply the plaintiffs' deny specifically many allegations of the answer, and aver that, prior to the construction of the Pennsylvania and Ohio canal, the canal company entered into a contract with the Franklin Land Company, which last named company then owned the premises described in the petition and held the legal title thereto; that in said contract it was provided that the canal company should construct its canal between two walls in the river, and that between the canal and the east bank of the river water should continuously flow from the pond created by the canal dam down to and past the premises now owned by plaintiffs for the express use, convenience, and enjoyment of the owners of said premises and their assigns, and for the propulsion of valuable mills and machinery located on said premises; that in the contract all riparian and other rights to the waters of said Cuyahoga river and the flow of the stream thereof were expressly reserved as an appurtenance of and to the premises now owned by plaintiffs and to said land company as the owners thereof and its assigns, and that said riparian rights, water privileges, and appurtenances, and mill powers, property and premises, by divers and sundry mesne grants, conveyances, and assignments, became and are the property and inheritance of the plaintiffs as appurtenant to the premises described in the petition; that such riparian rights and privileges were always recognized by the canal company as appurtenant to said premises, and were always exercised and asserted by plaintiffs and their grantors without let or hinderance from any body and under claim of right by them.

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Further replying, plaintiffs say that said Pennsylvania and Ohio canal was substantially abandoned long previous to plaintiffs' purchase of their property and premises; that no repairs were done on the canal after 1862, and the same was suffered to get out of repair and become practically unnavigable before July 18, 1864, and the evidences were then conclusive and plenty that the same would soon be completely and permanently abandoned, and that previous to March 3, 1868, the canal had been entirely abandoned by said canal company, and suffered to become entirely useless and out of repair for the purposes of a public highway by means of said canal as a water-way, and has ever since been abandoned as a canal or public highway by means of water navigation; that for a period of more than twelve months prior to March 8, 1869, said canal had been entirely abandoned and suffered to become entirely useless and out of repair, and had entirely fallen into disuse as a canal or public highway by means of water navigation by boats or other means of conveyance upon or through the waters thereof; and plaintiffs say that at the December term, A. D. 1872, of the supreme court of the state of Ohio, in a suit therein pending in the nature of *quo warranto*, instituted by the state of Ohio on the 8th day of March, 1869, the said Pennsylvania and Ohio Canal Company was, by judgment, order, and decree of said court, dissolved and altogether ousted from its corporate rights, privileges, and franchises, and altogether ousted and excluded from being a body politic and corporate of and within said state, and from all and singular, and any and all rights, powers, privileges, and franchises appertaining or attaching to such corporation under the laws of said state, and that said corporation was and is to all intents and purposes dissolved and dead; that thereafter neither the Pennsylvania and Ohio Canal Company, nor any other corporation or person, had any right to keep or maintain, in said Cuyahoga river, any of the artificial obstructions built and placed in said river by the canal company for the purposes of its canal; that these defendants can acquire no right by

reason of such obstructions ; that the same are unlawfully there, and unlawfully kept and maintained in the river ; that if all such unlawful obstructions were removed the larger part of the waters of said river would naturally flow against the east bank, on which plaintiffs' factories stand.

The court of common pleas made the injunction perpetual, and the action was appealed to the district court.

On trial, in the district court, it was agreed that formerly the Franklin Land Company owned both sides of the river from the dam above this property down to a point below this property upon the river to the south end of the disputed property and including it. "And the rights of the land company and their title, as it is conceded, was conveyed to the land company from the Franklin Silk Company. From the Franklin Land Company by sheriff to Zenas Kent, from Zenas Kent to H. A. and Marvin Kent, from H. A. Kent by quitclaim to Marvin Kent. And then comes the contract and deed from Marvin Kent to Day, Williams & Co. This is the subject of the agreement."

The deed from Marvin Kent to Day, Williams & Co. as to this part of the property, was a general warranty deed, except the right to abut a dam on part thereof. This deed bounded the property as set forth in defendant's answer.

The defendant claimed title to the property it had entered upon, by virtue of its purchase from the assigns of the trustees of the Pennsylvania and Ohio Canal Company, acting in the case of *The State ex rel. Attorney-General v. The Pennsylvania and Ohio Canal Co.*, 23 Ohio St. 121, when that company in Ohio was dissolved and its property sold ; and also by the verbal consent of Marvin Kent, given to it, to so use the property. The canal company obtained its rights in the property from the Franklin Land Company by a contract, granting to the company as follows :

"The canal company shall use the canal dam and waters therein for canal purposes, and the land company shall use the same dam and the water therein, as well as the water passing round the lock at that point for the propulsion of

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water wheels: and in consideration further that said canal company shall locate and construct their canal so as to lock down into said canal dam and pass out of the same by a lock in the dam thence to the south line of the lands purchased by said land company of Zenas Kent. Said canal shall be constructed between two walls in the river bed and so far from the east bank of the river as to leave a space between the said east bank and the walls of the canal of sufficient width for a convenient tail race for such wheels as said land company or their assigns may there construct, and this race shall be excavated by said canal company the whole length to a level with the apron under the wheels of the flouring mill bought by said land company of Zenas Kent and pass under the canal into the river channel by a culvert at or near said south line."

The contract also permitted the canal company to take and divert "from said river such quantity of water as will be sufficient to keep said canal in a navigable state at all times when the same shall be navigated, and when the navigation of said canal shall be interrupted by frost or otherwise said canal company shall have the right to draw from said river so much water as shall be necessary for the purpose of sustaining the levels and preserving the canal, taking due care to keep the lock gates shut and to prevent any unnecessary leakage. Upon condition, however, that the lake reservoirs shall be constructed and used in the manner recommended in the report of S. Dodge, Esq., made to the board of directors of said canal company on the 6th day of July, A. D. 1835, or in the manner recommended in the report of Alfred Kelley, Esq., made to the executive committee of said board of directors July 29, 1835, reference to said reports being hereby had," etc.

On trial, the majority of the district court found that the plaintiffs were not entitled to the relief prayed for in their petition, and dismissed the same at plaintiffs' costs, without prejudice to their right to bring an action at law to recover the possession of the premises described in the

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petition, or such other action as may be necessary to determine their rights.

A bill of exceptions was taken, and plaintiffs seek a reversal of that judgment, and the injunction prayed for, and the establishment of their rights.

Myron A. Norris and M. Stuart, for plaintiffs in error.

T. W. Sanderson, for defendant in error.

FOLLETT, J. A correct understanding of the facts of this case, set forth and shown in the statement and diagram heretofore, is necessary to the proper application of the legal principles that determine the rights of the parties.

But plaintiffs' rights depend greatly upon the true construction of the deed of Marvin Kent and wife to them, dated March 3, 1868.

And the defendant's rights depend upon what was conveyed to its grantor by the trustees of the Pennsylvania and Ohio Canal Company after the ouster of that company by this court, as shown in the case of *The State ex rel. Attorney-General v. Pennsylvania & Ohio Canal Co.*, 23 Ohio St. 121.

I. What rights has the defendant, The Pittsburg, Youngstown and Chicago Railroad Company, in this disputed property?

The Franklin Land Company owned both sides of the Cuyahoga river where this property is in dispute, and, while such owner, it made the contract with the Pennsylvania and Ohio Canal Company, dated May 27, 1836.

The contract provided that "said canal shall be constructed between two walls in the river bed and so far from the east bank of the river as to leave a space between said east bank and the walls of the canal of sufficient width for a convenient tail race for such wheels as said land company or their assigns may there construct, and this race shall be excavated by said canal company the whole length to a level with the apron under the wheels of the flouring mill bought by said land company of Zenas Kent, and pass

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under the canal into the river channel by a culvert at or near said south line."

It also provided that "the canal company shall use the said canal dam and waters therein for canal purposes, and the land company shall use the same dam and the water therein, as well as the water passing round the lock at that point, for the propulsion of water wheels; and in consideration further that said canal company shall locate and construct their canal so as to lock down into said canal dam and pass out of the same by a lock in the dam thence to the south line of the lands purchased by said land company of Zenas Kent."

It further provided that "when the navigation of said canal shall be interrupted by frost or otherwise said canal company shall have the right to draw from said river so much water as shall be necessary for the purpose of sustaining the levels and preserving the canal, taking due care to keep the lock gate shut and to prevent any unnecessary leakage."

The canal company must locate the canal at a distance west of the east bank of the river "of sufficient width for a convenient tail race."

These provisions clearly show that the canal company took only the right to use the property west from a line west of the east bank of the river, and to use the water of the river so far only as needed for the canal. And when the canal company was dissolved, this right must be regarded as abandoned and it reverted to the land company and to its grantees. *Corwin v. Cowan*, 12 Ohio St. 629; *Longstreet v. Harkrader*, 17 Ohio St. 28, 29.

This left nothing that the trustees of the canal company could sell and convey, unless perhaps something that they could remove from this property. And the defendant has no rights in this property by virtue of any conveyance or sale by such trustees.

This position is fully sustained in case of *McCombs v. Stewart*, 40 Ohio St. 647, where, as to a similar conveyance of these same trustees, it is held: "A canal company, in-

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incorporated under the act of January 10, 1827 (25 Ohio L. 3), erected across a river a dam . . . causing the water to flow back upon the lands of a proprietor above the dam on the stream. The company owned in fee-simple, by purchase, the land on which the south half of the dam was built, but none of the land on which the north half was built; and conveyed, in fee-simple, to certain mill owners, the land it thus owned, and granted to them and their heirs the privilege of using the surplus water of the dam not required for canal purposes. *Held*, the right of the company acquired by appropriation, to flow the lands of such proprietor by maintaining a dam of such height, did not, by virtue of the company's conveyance and grant to the mill owners, survive and vest in them after the dissolution of the corporation."

In the case of *Pittsburg and Lake Erie R. R. Co. v. Bruce*, 102 Pa. St. 23, as to another such conveyance by the trustees it is held, "that the company acquired under the terms of the charter a right of way only over the lands appropriated by them, and that they did not acquire said lands in fee;" that "said canal company having become insolvent, and all its property and franchises being sold to a railroad company by order of court: *Held*, that said last named company could not construct its tracks on the right of way acquired by the canal company without compensation to the owner of the land." This company had only the right to use the property and the waters of the river for the canal, and after ouster and dissolution neither the company nor the canal remained or existed.

If we disregard the form and averments of the pleadings, whether or not the defendant acquired any rights in this property through the verbal permission of Marvin Kent, is determined by what rights Kent had at *that* time, long after his deed to plaintiffs.

II. What rights have the plaintiffs in this disputed property?

We will not stop to discuss what rights their possession
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gives them, though this is valuable, especially in connection with their contract and deed. On the trial it was agreed by the parties that "the Franklin Land Company owned both sides of the river from the dam above this property, down to a point below this property upon the river to the south end of this disputed property and including it. And the rights of the land company and their title, as it is conceded, were conveyed . . . from the Franklin Land Company by sheriff to Zenas Kent, from Zenas Kent to H. A. and Marvin Kent, from H. A. Kent by quitclaim to Marvin Kent. And then come the contract and deed from Marvin Kent to Day, Williams & Co. This is the subject of the agreement." By this written contract Marvin Kent sold to Day, Williams & Co. "that lot of land and the buildings and improvements thereon known as the Franklin Glass Works," and he bounded the property by running the line the other way from what it is run in the deed. The contract is dated July 18, 1864, and the deed is dated March 3, 1868, and was made to carry out the contract. As to this property the deed contains a covenant of general warranty, and described the property, "with the buildings and improvements thereon, known as the Franklin Glass Works, situate in said town of Kent, and is known as being a part of township lot number twenty-five (25), in said township of Franklin, and bounded and described as follows, to wit: Beginning at a point in the west line of Canal street in said town of Kent where a continuation west of the south side of Mill street crosses said Canal street; thence south $18^{\circ} 15'$ west seven chains and thirty-one and one-third links to a post in the west line of Canal street; thence north $72^{\circ} 30'$ west four chains and twenty-one links to the Pennsylvania and Ohio canal (the east bank of which is hereby understood to be what was formerly the east bank of the Cuyahoga river); thence northerly along the east bank of the Pennsylvania and Ohio canal to a point where the continuation west of said south line of Mill street intersects the east line of said Pennsylvania and Ohio canal; thence north $89^{\circ} 45'$ east one chain and fifty-

eight links to the place of beginning, containing — acres of land, be the same more or less."

By the *terms* of the deed, Kent conveyed to the plaintiffs all the rights he had in this property along the the east bank of the river and up "to the Pennsylvania and Ohio canal," and then adds in parenthesis, "the east bank of which is hereby understood to be what was formerly the east bank of the Cuyahoga river," and he made no reservation of any part of the bed of the river or of any water privileges. When the canal was gone there was nothing left but the river.

As early as *Gavit v. Chambers*, 3 Ohio, 496, this court held: "In Ohio, owners of lands situate on the banks of navigable streams running through the state, are also owners of the beds of the rivers to the middle of the stream, as at common law." And the same is true of all streams away from tide-water.

In *Benner v. Platter*, 6 Ohio 504, this court held: "A call in a survey, for a stream not navigable, is a call for the main branch of such stream, and the boundary is the middle of the stream."

In *Lamb v. Rickets*, 11 Ohio St. 311, the court held: "Where the owner of land is bounded by a stream, he owns to the center of the stream, subject to the easement of navigation." Here it was subject to the rights of the canal company.

In *Walker v. Board of Public Works*, 16 Ohio, 540, the court repeats the holding: "He who owns the land on both banks of a navigable river, owns the entire river, subject only to the easement of navigation; and he who owns the land upon one bank only, owns to the middle of the main channel, subject to the same easement." And also: "The legislature can not, by declaring a river navigable which is not so in fact, deprive the riparian proprietors of their rights to the use of the water for hydraulic and other purposes, without rendering them compensation."

In *June v. Purcell*, 36 Ohio St. 396, this court went further and held: "The principle decided in *Gavit v.*

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Chambers, 3 Ohio St. 496, that the owners of lands situate on the banks of navigable streams running through the state are also owners of the beds of the rivers to the middle of the stream, as at common law, has become a rule of property, and, irrespective of the question of its original correctness, ought not to be disturbed." And, in the opinion, White, J., adds: "To disturb the rule now would be a dangerous tampering with riparian rights." Such is the law of England and of most of the states.

If the grantor does not intend to convey the bed of the river and the water in the water-course bounding the land conveyed, he must insert in the instrument of conveyance proper words for the purpose of reservation or exclusion; "but in the absence of such words, the bed, and consequently the stream itself, passes by the conveyance." *Ang. Wat.*, §§ 9 and 17, and cases there cited. Here there was no such reservation or exclusion.

The plaintiffs had all the rights ever held by Marvin Kent in this property, and the defendant took nothing by Kent's permission.

The court erred in permitting Kent to testify as to any permission he gave the defendant in the property, and it also erred in the construction of plaintiffs' deed, and of defendant's conveyance.

Judgment reversed; injunction granted and made perpetual, and cause remanded.

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Mechanics' Liens—Revised Statutes, sections 3193, 3195, 3201, 3202—Construction—Claim against contractor—Set-off.

1. The statutes of this state upon the subject of mechanics' liens, being remedial in their nature, are to be liberally construed in order to carry out the purpose of the legislature in their enactment.
2. Where a mechanic, who, under the employment of a contractor, and with the knowledge of the owner, has performed labor upon the construction

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of a building, and the account not being paid, takes all necessary steps, as provided by sections 3193, 3195, 3201, and 3202 of the Revised Statutes, to fix the liability of the owner and to obtain a lien upon the premises, and brings his action against the owner to recover the amount due and have the same declared a lien, such account being less than the balance unpaid on the contract, such owner can not be allowed to set off a claim against the contractor, not growing out of the contract, acquired by him after the labor was performed, although such claim was acquired before notice that the mechanic's demand had not been paid.

ERROR to the District Court of Lorain county.

The action is brought to reverse a judgment of the district court of Lorain county reversing the judgment and decree of the court of common pleas of that county. In the last named court the plaintiff in error, a carpenter, brought his action to recover upon an account for labor performed upon the dwelling of the defendant in error, and to have the same declared a lien upon the premises under the laws relating to mechanics' liens. From the findings of the court of common pleas the following facts appear: In May, 1883, the defendant entered into a contract with one Asa Bullock to erect a dwelling-house on premises owned by defendant. Bullock was to be paid one-third when the building was inclosed, one-third when the plastering was finished, and the balance when the building was completed. Between the 12th day of June and the 25th day of August, 1883, the plaintiff performed work upon the building at the instance of the contractor (Asa Bullock), which is the basis of the account. On the last named date the house was completed and accepted. On that day, the amount due plaintiff being wholly unpaid, he demanded payment of the contractor, which was refused. On the 11th day of September, following, the plaintiff filed with the defendant an itemized account of the amount and value of his labor, with all credits, pursuant to the statute. At that time there remained unpaid on the contract a sum in excess of the amount due the plaintiff. The account of plaintiff was acknowledged by the contractors to be correct, and the defendant was notified of that

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fact. Shortly after, the plaintiff filed with the county recorder a proper affidavit and took all the steps necessary to complete his lien upon the premises. On the 3d day of September, 1883, the defendant purchased in good faith for full consideration, of a lumber company, a valid account against the contractor for an amount in excess of the plaintiff's claim. The defendant was at the time a stockholder in the lumber company. At the time of the purchase the defendant knew the plaintiff had performed labor for the contractor upon the house, but did not know whether he had been paid or not, and the first knowledge he had of plaintiff's claim was on the 11th day of September. It does not appear that the account of the lumber company was for material furnished for the building upon the premises in question, nor that it, in any way, had relation to the same. This claim defendant plead, in the court of common pleas, as a set-off.

E. G. and W. H. Johnson, for plaintiff in error.

Metcalf & Webber, for defendant in error.

SPEAR, J. It is not claimed in this case that the defendant's assignor, the lumber company, had, by virtue of its claim against the contractor, any lien upon the premises; nor is it denied that the plaintiff had complied with the law entitling him to recover against the defendant, and to a lien. The only question is as to the right of set-off in favor of the defendant and against the plaintiff. The proposition may be stated thus: Can the owner of premises, having knowledge that a mechanic has performed work upon a building thereon, under employment of the principal contractor, set off against a claim for work, so done, a claim against such contractor, not arising out of the contract under which the building is constructed, or in any way having relation thereto, and acquired by such owner after the labor was performed by the mechanic, but before the owner had notice that the mechanic had not been paid?

The question is to be determined by a consideration of the several sections of our statute relating to mechanics' liens. Without quoting at length from these sections, their effect, so far as they apply to the question here, may be stated. Sections 3184-3192, Revised Statutes, provide for the taking of a lien upon the premises by the contractor. Section 3193, and following, give the right to a lien to any sub-contractor, laborer, or mechanic, who, under employment of the head contractor, performs labor or furnishes material for the improvement, and who has not been paid. He may file with the owner a sworn and itemized account of the amount and value of the labor or material, with all credits and set-offs, and upon receiving such notice the owner shall detain in his hands all subsequent payments from the principal contractor upon the contract in an amount sufficient to satisfy the claim. Within five days after receiving such account the owner is required to notify the contractor, and if within five days thereafter he does not notify the owner of his intention to dispute or commence an action to adjust the account, he is deemed to assent to its correctness, and thereupon such subsequent payment shall be applied by such owner to the account. If the contractor neglect to pay within five days after such assent to the correctness of the account, the owner shall pay, when due, the whole, or, in case other claims have been filed, a pro rata amount, as the case may be, out of subsequent payments owing to the contractor, and on his failure for ten days, the sub-contractor, workman, or material-man may recover against the owner in an action for money had and received, when due, the whole, or a pro rata amount, as the case may be, not exceeding in any case the balance due to the principal contractor.

In addition to this remedy, the workman or material-man, by complying with subsequent provisions, may have a lien upon the premises which shall date back from the date of performing the first item of labor, or of the first material furnished, which shall have the same operation, effect, and duration, and be subject to the same obligations

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with respect to the owner, as the lien of the head-contractor in similar cases. Such lien shall take precedence over any lien already taken or to be taken by the contractor, and an assignment or transfer by such contractor of his contract with the owner, as well as proceedings in attachment, or otherwise, against such contractor, to subject or incumber his interest in such contract, shall save and be subject to the claim of every laborer, mechanic, or material-man who has furnished labor or material toward the erection or repair of the structure.

The statute is highly remedial in its character, and should receive such liberal construction as will carry out the purpose of the legislature in its enactment. The labor of the workman and the material of the material-man having contributed to the erection of the structure; having, indeed, created, in part the very property on which the lien is sought to be attached, the purpose of the law is to give to such parties the right, where the contractor refuses to pay, to be paid for their labor and material out of the fund which has been earned under the contract, and out of the structure, and the land upon which it stands, such claim, as to amount, not to be in excess of the claim of the contractor as measured alone by the contract and his performance of it.

In giving a construction to this statute, by fair inference it may be assumed that the rights of the workman and material-man, as against the owner, are based upon the latter's contract with the contractor, and while they are subordinate to the contract, and are to be worked out through it, those parties have the right to rest in security upon it and the means provided by law to secure its application to their demands. In the absence of fraud they are presumed to have notice of the terms of the original contract. Hence, if the original contract showed that payment had been made in advance to the contractor, or if it contemplated the allowance, by the contractor, of set-off then held or to be acquired by the owner as payment, such provisions would bind the workmen and material-men, as they would be held to have accepted employment of the

contractor with an implied assent to such terms. But, where the contract was silent as to advance payments, and as to claims of the owner against the contractor, the workmen and material-men could not be held to have accepted employment with a view to such contingencies.

The purpose of laws of this character is, as stated by Phillips, in his work on *Mechanic's Liens*, "to take from the owner money actually owing by him upon his contract and apply it in payment for the labor and material which the workmen and material-men have contributed toward the performance of the same contract." And, where it is provided, as in our statute, that an assignment or transfer by the contractor of his contract with the owner shall save and be subject to the claims of the workmen and material-men who have furnished labor or material toward the construction of the improvement, such provisions operate as an equitable transfer to the workmen and material-men of the money due to the contractor by the owner, subject only to such obligations as spring out of the contract itself. This construction is believed to be founded in reason and to be supported by the holdings of courts in other states upon the subject. The amount owing to the contractor under the contract being thus found to be transferred to the workmen and material-men, it would seem to follow that any process, proceeding, or device which has for its object the wresting from the workmen and material-men of their equitable hold upon the amount due under the contract, being the result of and produced by their labor and material, would be directly against the spirit of the law, if not against the very letter itself. All proceedings by attachment, or otherwise, to subject or encumber the contractor's interest in the contract, are to save and be subject to the claims of the workmen and material-men, and it is difficult to perceive why the allowance of a set-off against the contractor acquired by the owner, after the labor is performed or the material is furnished, would not work the same substantial result that would be reached by attachment, nor why it would not divert the security afforded

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by the contract from those whom the statute contemplate shall have the benefit of it, and thus accomplish, indirectly, in favor of the owner, that which the statute provides shall not be done by any one, directly. Had the defendant's assignor sought to reach the interest of the contractor in this contract, as against the claim of the plaintiff, by proceedings in attachment, or by any proceeding known to the law, the very letter of this statute would have proved an effectual bar. How can it (the company) evade the law by selling the claim to another? Ordinarily the purchaser of an overdue claim stands in no better position than his assignor. The rule admits of many exceptions, especially as to matter of remedy, but to regard the present case as affording a ground of exception would, to our mind, work a clear violation of the spirit of the statute.

It is contended that the defendant's claim against the contractor was a cross demand in such sort that a statutory set-off existed in his favor. As against the contractor, in a suit upon the contract, the set-off might be effective, but the equities of the mechanic under this statute introduce another element into the case. The doctrine of set-off is of equitable origin, is a graft from equity upon the law, and, though incorporated into our statute, is to be administered in accordance with the principles of equity, and is not to be extended beyond the words of the statute in cases where, under the rules of equity, it should not be held to apply. Our statute, which provides that where cross demands have existed between persons under such circumstances, as that if one had brought an action against the other, the set-off could have been set up, neither can be deprived of the benefit thereof by assignment, but the two demands shall be deemed compensated, applies to a case where, an action being brought by one upon a claim obtained from another, the party sued seeks to set off a cross demand against that other. In such case he can not be deprived of his remedy because of the fact that the action is brought by the assignee rather than the assignor. And a sufficient reason is that, aside from the consideration of avoiding circuity of

action and multiplicity of suits, it would be inequitable to allow one to deprive another of his right of set-off by an assignment of the claim to a third person in favor of whom no equity of any kind exists. His claim is based wholly upon the consideration moving in favor of the assignor; the assignee stands in his shoes, and hence he can not have any advantage which the assignor might not have had in a suit brought by himself. But we have not that case here. The workman or material-man stands in the contractor's shoes only as regards the contract itself and payments upon it, and not as regards matters or claims extrinsic of the contract. The consideration which supports his claim is his labor or material upon the structure wherein the owner himself has an interest and of which he gets the benefit. There is, therefore, a consideration moving directly in favor of the workman or material-man, and it would be grossly inequitable for the doctrine of set-off to be interposed to prevent him from receiving the benefits of the statute, and thus to enable the owner to take one man's property to pay another man's debt.

It is further contended that the set-off of the defendant should be treated as a payment upon the contract; that it is the balance due from the owner to the contractor which the workman or material-man may stop the payment of, the language of the statute being "not exceeding in any case the balance due to the principal contractor," and that this balance due can not be ascertained until the cross demand is deducted from the contract price. This claim is not tenable. Taking the whole statute together it is reasonable to construe this phrase as applying only to the moneys due by the owner to the contractor *under the contract*. This follows because the rights of the workman and material-man as against the owner are controlled by the contract and are in strict subordination to its terms, and to construe the language quoted as implying balance due on general account would be to engraft upon the contract other and inconsistent terms, the effect of which would be to incumber the contractor's interest in the contract; it

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would be to supplant the implication that the consideration was to be paid in money by a provision that it could be paid or satisfied in some other way. We have already said upon the general subject of set-off and cross demands all that seems necessary. Keeping in mind that it is the subsequent payments which the statute gives the workman and material-man a right to have kept back, upon what principle can the set-off be treated as payment? A payment is said to be a mode of extinguishing obligations. Not only that, but where the contract calls for money, ordinarily it is money which must be paid unless the creditor agrees to accept something else as its equivalent. This act calls for the exercise of the will, of consent, and without consent it can not be regarded as extinguishing the obligation. Without reference to the peculiar wording of section 3204 of the statute, wherein payment is treated of, the conclusion that this set-off could not perform the office of a payment seems irresistible. But a reference to that section may not be unprofitable. It provides that if by collusion or fraud the owner pay in advance of the payments due under the contract, and diminish the amount of the funds, he shall be liable in the same manner as if no such payment had been made; but any such payment made in good faith to complete the work according to the original contract shall not be held as fraudulent or collusive. It would seem not unreasonable to claim from the language of this section that, as to advance payments, the owner may not make them simply to accommodate the contractor, or even to accommodate himself, but that the advance payment allowed and described as not fraudulent or collusive, being one made in good faith in order to complete the contract, a payment made in advance for any other purpose would not avail the owner as against the workman or material-man, but as to them would be held to be fraudulent and collusive. A construction of this section is not necessary to a determination of the case at bar, but it is suggested that the significant language therein throws much light upon the purpose and object of the

whole statute, and re-enforces the conclusions we have drawn from the other sections.

Again it is contended that the term set-off as used in section 8202 refers to set-off as against the contractor in the hands of the owner; as though there is some magic in the word "set-off," in the connection in which it is used, which shows that the claim of the workman and materialman is subject to every set-off. We do not so construe it. To expect those parties, before filing a claim, to inquire into and ascertain whether a set-off exists in favor of the owner against the contractor, and incorporate that into their claim, is manifestly unreasonable.

Nor is the claim of hardship as regards the owner apparent. It was no more unreasonable to require him, before purchasing a claim against the contractor, to learn whether the workman, whom he knew had performed labor on his house, had been paid, than to ask that workman to anticipate the possibility of the purchase of a claim against the contractor, and give earlier notice. He may have had good reason to rely upon the contractor in the full belief that if the money should be paid by the owner that same money would forthwith pass to him. At all events he had the right to rely upon the contract and the law.

We do not deem it necessary to undertake a review of the many decisions of the courts of the several states cited by counsel. They have all been examined, as well as many others, and it is believed that, while there is not uniformity in the holdings, owing, in a measure at least, to variance in the terms of the statutes, the general drift will be found in the direction of the conclusions we have reached in construing the statutes of our own state. Nor is it necessary to review the two cases in Ohio referred to. *Copeland v. Manton*, 22 Ohio St. 398, an instructive case, was based upon dissimilar facts, and the question here presented was not before the court. Besides, very marked changes have been made in the statute since the facts of that case arose. The same may be said as to *Dun v. Rankin*, 27 Ohio St. 132,

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where the opinion was delivered by the learned judge who pronounced the opinion in the earlier case.

Judgment of district court reversed and that of common pleas affirmed.

MERIDEN SILVER PLATE COMPANY v. FLORY.

Revised Statutes, section 5833—Notice by surety to holder of note to sue principal—Reasonableness of delay—Solvency of principal—Non-residence of holder.

1. The requirements of section 5833 of the Revised Statutes, providing for notice by a surety to his creditor to commence action forthwith against the principal debtor, are satisfied by substantial compliance; and a notice which is positive in its request to sue, and does not mislead the creditor as to the instrument to be sued upon, is sufficient.
2. A corporation of the state of Connecticut, holding a matured joint note executed in this state by C. M. Rider, principal, and Flory & Havens, sureties, residents of this state, made demand of payment by mail upon the sureties, who at once returned the following: . . . "Yours of the 12th came to hand. If you hold any note signed by C. M. Rider and ourselves, C. M. Rider is the principal, and we are only sureties, and we notify you to commence an action on the note forthwith, and proceed to collect it. Rider is able to pay his own notes. Yours, Flory & Havens." *Held*, the notice was sufficient.
3. This notice was received on October 17, 1878. The action was commenced January 25, 1879. The delay was unexplained, except by the fact that the plaintiff was a resident of the state of Connecticut. *Held*, there was no error in finding as a conclusion of law that the action was not commenced within a reasonable time after notice.
4. The duty of the creditor to proceed within a reasonable time after such notice, is imperative. It is the right of the surety to require that action be brought against the principal and diligently proceeded with; and this right is not qualified or affected by the fact of solvency or insolvency of such principal.
5. Where the principal and surety are residents within the same jurisdiction, the duty of the creditor to commence an action, as required, is not affected by the fact that he is a resident of another state.
6. To entitle the surety upon a note to the benefit of section 5833, *supra*, it

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is not necessary that the fact of suretyship should appear upon the face of the note.

ERROR to the District Court of Licking county.

June 1, 1878, C. M. Rider, principal, and Flory & Havens, sureties, all residing and being in Licking county, Ohio, drew their joint note of that date for \$326.58 to the order of Meriden Silver Plate Company, a corporation of the state of Connecticut, and doing business therein, due four months after date, and delivered it to the payee. October 14, 1878, the note being unpaid, Flory & Havens received, at Newark, Ohio, a letter of the following tenor:

“WEST MERIDEN, CONN., Oct. 12, 1878.

“*Messrs. Flory & Havens, Newark, Ohio.*

“GENTLEMEN:—No doubt you are aware that the joint note made in our favor by C. M. Rider and yourselves, due 1-4 inst., was protested for non-payment. Please see that we have N. Y. funds by return mail in settlement of the protested note: \$326.58; plus, \$1.50; total, \$328.08, and much oblige, yours, truly,

“THE MERIDEN SILVER PLATE CO.

“ROBERT H. CURTIS, *Treasurer.*”

Flory & Havens at once wrote and mailed a response of the following tenor:

“NEWARK, OHIO, Oct. 14, 1878.

“*The Meriden Silver Plate Company, West Meriden, Conn.*

“Yours of the 12th came to hand. If you hold any note signed by C. M. Rider and ourselves, C. M. Rider is the principal and we are only his sureties, and we notify you to commence an action on the note forthwith, and proceed to collect it. Rider is able to pay his own notes. Yours, respectfully,

FLORY & HAVENS.”

The plaintiff commenced suit on this note in the Licking common pleas court, against all the makers, on January 23, 1879.

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The pleadings are voluminous and the issues below were numerous. There is no bill of exceptions in the record. The trial court, on request of the plaintiff, stated its findings of fact and conclusions of law.

So far as they involve the questions considered in the opinion they are: "The court finds as matters of fact . . . that the treasurer of the plaintiff's corporation, Robert H. Curtis, wrote a letter as set out and stated in the plaintiff's reply to the third defense in the defendant's answer, and that in reply to the letter of said Curtis, as such treasurer, the defendants, Flory & Havens, wrote and mailed at Newark, Ohio, the answer dated October 14, 1878, a copy of which is also set out and correctly stated in plaintiff's reply to the third defense, and which is the notice the defendants, Flory & Havens, claim to have served upon said plaintiffs in said third defense. The court finds that on the issue made concerning the giving of the notice claimed by the defendants that the notice, a copy of which is set out in the reply, as aforesaid, was duly deposited in the post-office at Newark, Ohio, on October 14, 1878, duly directed to the plaintiff at West Meriden, in the state of Connecticut.

"That by due course of mail said notice would reach the plaintiff in thirty-six hours after such deposit in the Newark post-office. That this suit was commenced January 23, 1879, *and from said evidence* the court finds as a matter of fact that the said plaintiff received said notice on or before October 17, 1878. *That no other notice was sent or given them than as above stated.* The court also finds as a matter of fact that since December 25, 1878, the said Rider has been, and is insolvent, and has no property subject to levy and sale on execution.

"And the court finds as matters of law arising upon said facts that said notice was sufficient in law, and under the statute, and that the said plaintiff did not within a reasonable time after said notice was deposited in the post-office at Newark, Ohio, as aforesaid, and received by the plaintiff, as aforesaid, commence action on said note, and have

thereby forfeited the right which it would otherwise have to demand and receive of said Flory & Havens, as such sureties, the amount due thereon."

The letters referred to in these findings are those heretofore set forth in this statement.

Upon the facts so found, and those admitted by the pleadings, judgment was rendered for the defendants, Flory & Havens.

This judgment was affirmed on error in the district court. The present proceeding is prosecuted to reverse the judgment below.

Charles Follett & Son, for plaintiff in error, contended that the letter sent by the defendants to the plaintiff was not a sufficient notice in law to work a forfeiture of their right to enforce payment of the note against the defendants, and that it did not relieve them from payment, inasmuch as no particular note was referred to and no declaration that unless suit was brought they would no longer remain liable, and cited *Baker v. Kellogg*, 29 Ohio St. 663; *Kaufman v. Wilson*, 29 Ind. 504; *Iliff v. Weymouth*, 40 Ohio St. 101.

The delay in bringing suit was not unreasonable. The plaintiff was a Connecticut corporation, doing business in that state. That fact must be considered in imputing negligence. *Davis v. Hatcher*, 10 Am. Law Reg. (N. S.) 519.

There was nothing in the note to indicate the suretyship of the defendants. Hence they could not avail themselves of the statute. *Brandt Suretyship*, sec. 503; *Payne v. Webster*, 19 Ill. 103.

J. A. Flory, for defendants in error.

The notice was sufficient. Section 5833, Revised Statutes; *Clark v. Osborn*, 41 Ohio St. 28; *Franklin v. Franklin*, 71 Ind. 573; *Routen v. Lacy*, 17 Mo. 399; *Brandt Suretyship*, sec. 504; *Iliff v. Weymouth*, 40 Ohio St. 101.

The finding of the court below that the delay was

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unreasonable is conclusive. *Ralston v. Kohl*, 30 Ohio St. 92.

The delay was unreasonable. *Nash v. Harrington*, 18 Am. Dec. 672; *Aymar v. Beers*, 17 Am. Dec. 538; Swan's Treatise, 718, 719; Spalding's Treatise, 475; 3 Kent Com. (12 ed.), 88; *Clark v. Osborn*, *supra*.

The sureties were released by the delay. *Pain v. Packard*, 13 John. 174; s. c., 7 Am. Dec. 369; *King v. Baldwin*, 17 John. 384; s. c., 8 Am. Dec. 415; *Colgrove v. Tallman*, 67 N. Y. 99; *Bruce v. Edwards*, 1 Stew. 11; s. c. 18 Am. Dec. 33; *Ide v. Churchill*, 14 Ohio St. 386; *Hempstead v. Watkins*, 6 Ark. 317.

OWEN, C. J. Three alleged errors are assigned as grounds of reversal of the judgments below.

1. That the facts found by the court did not warrant the conclusion that the letter of Flory & Havens to the plaintiff, dated October 14, 1878, notifying it to commence an action on the note, etc., was received by the plaintiff October 17, 1878, or at all.

2. That the court erred in finding that such letter was sufficient notice under the statute authorizing notice by surety to the holder of a note to commence action, etc.

3. That, even if the notice was sufficient, the court erred in finding that the plaintiff did not, within a reasonable time, commence action on the note.

I. Assuming that the finding is based solely upon the facts stated by the court, it is evident that it proceeded upon the presumption that the alleged notice reached the plaintiff by due course of mail. We have in the record, however, a further admitted fact.

The company alleges, in its reply to an answer of Flory & Havens, filed in the case, that this letter "was mailed at Newark, Ohio, on or after the date thereof, October 14, 1878, and in due course of the mail taken from the post-office at West Meriden, in the state of Connecticut, by some one for said plaintiff corporation, but who plaintiff

can not state, or when it came to the notice of the officers or directors of said corporation."

If this letter was taken from the post-office by some one "for the corporation," this was equivalent to its receipt by the corporation. It was not necessary that such person should have been either an officer or director. If he was a stranger, or had no authority to receive it, there was no warrant for the statement that it was taken from the post-office for the corporation.

There was no error in this finding of the court.

II. Was the notice insufficient in law in that it was conditional?

Section 5833, Revised Statutes, provides that a surety in such a case may "require his creditor, by notice in writing, to commence an action on such instrument forthwith, against the principal debtor," etc. It was held in *Baker v. Kellogg*, 29 Ohio St. 663, cited and relied on by plaintiff, that the notice under this provision "must contain an unconditional requirement to commence an action forthwith; and a notice that the surety 'wishes' the creditor 'to proceed against the principal debtor' and collect 'the claim or have it arranged in some way,' and that the surety does 'not wish to remain bail any longer,' is not sufficient."

The notification in the case at bar was qualified with no condition. True, the sureties said: "If you hold any note signed by C. M. Rider and ourselves, C. M. Rider is the principal and we are only his sureties," etc. There was but one note in question. There could have been no doubt at all concerning the note to be put in suit. The plaintiff was then urging its payment by the defendants. But the notice then continues: "And we notify you to commence an action on the note forthwith, and proceed to collect it." Here was no condition, and there was substantial compliance with the statute. This is sufficient. *Clark v. Osborn*, 41 Ohio St. 28. The requirement of the notice was unmistakable. There was no error in finding it to be legally sufficient. Technical accuracy is not required. It is sufficient if the notice is positive and the creditor is not

misled. Brandt Suretyship, sec. 504; *Routen v. Lacy*, 17 Mo. 399.

III. Section 5833, *supra*, further provides that unless the creditor receiving the notice "commence such action within a reasonable time thereafter, and proceed with due diligence, in the ordinary course of law, to recover judgment against the principal debtor for the money . . . and to make, by execution, the amount thereof, the creditor . . . so failing to comply with the requisition of such surety, shall thereby forfeit the right which he would otherwise have to demand and receive of such surety the amount due thereon." The notice was received on the 17th of October, 1878. Suit was not commenced until January 23, 1879. The court found, as a conclusion of law, that the plaintiff did not commence action upon the note within a reasonable time after notice. Did the court err in this? We may take judicial notice of the fact that the January term of the court in which the action was brought commenced January 6, 1879. How far this fact entered into the consideration of the trial court, or whether that court considered the length of the next prior term, does not appear. We consider the question in the light of the facts found and stated by the court.

The plaintiff was a Connecticut corporation. It held the note of these parties residing in Ohio. This note being unpaid at maturity, the plaintiff caused it to be protested for non-payment. It then demanded payment of these defendants in error. They at once notified it that they were sureties for the first named maker who was able to pay his own notes, and required that it commence an action on the note forthwith and proceed to collect it. After a lapse of two months and eight days from the notice the principal became insolvent. After the lapse of three months and six days from the notice, action was commenced.

We are asked to say that the court ought to have found, and erred in not finding, that this fully answered the requirement of a statute providing for notice to commence suit forthwith, that such suit be commenced within a rea-

sonable time thereafter, and with due diligence proceeded with, etc.

We can not say this. We attach no importance, however, to the question of solvency or insolvency of the principal. The statute is not qualified by such considerations. It is imperative. It leaves no discretion with the creditor. It is the surety's right to require that action be brought and diligently proceeded with, that a test may be made of the principal's ability to pay.

The terms "reasonable time" and "due diligence" are to be construed with, and in the light of, the term "forthwith" to be used in the notice to commence the action. *Reid v. Cox*, 5 Blackford, 312; *Overturf v. Martin*, 2 Ind. 507; *Miller v. Childress*, 2 Humph. 320; *Brandt on Suretyship*, sec. 511; *Garraut v. Eliff*, 4 Humph. 323.

The case of *Davis v. Hutcher*, 10 Am. Law Reg. (N. S.) 519, described by the United States circuit court for southern district of Georgia, is cited as authority for the proposition that "the omission of the creditor to sue a principal residing in another state could not, under any circumstances, as between him and the surety, make him chargeable with gross negligence." In that case the surety resided in Georgia, while the principal resided in Alabama. It was simply held that the plaintiff need not go to the latter state to bring action against the principal. In the case at bar the sureties and the principal were all within the same jurisdiction. The plaintiff was compelled to come within that jurisdiction to sue either of them. There is nothing in the principle of the case last cited, nor in the fact that the plaintiff resided in another state, that excused it from obeying the requirement of the statute and of the notice. No hardship was imposed upon the plaintiff which was not contemplated by the statute. The third assignment of error is not well taken. The position, contended for by plaintiff in error, that the statute does not apply to the note in suit for the reason that there was nothing on the face of it to indicate the fact of suretyship, is untenable. In *Baker v. Kellogg*, 29 Ohio St. 663, cited *supra*, where the same defense was interposed by the

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surety as in the case at bar, there was nothing on the face of the note to indicate suretyship. It was held that parol evidence was admissible to prove that fact. The surety was discharged. There is no error in the judgments below.

Judgment affirmed.

HALDERMAN v. LARRICK.

Revised Statutes, section 6710—Practice.

This court has had no power since the amendment of section 6710 of the Revised Statutes, April 18, 1883 (80 Ohio L., 169), to reverse a judgment of the district court reversing a judgment of the common pleas and remanding the cause for a new trial on the merits.

MOTION for leave to file petition in error to the District Court of Ross county.

The district court of Ross county, at its September term, 1884, in a proceeding in error then pending, wherein Robert Larrick was plaintiff and Lauretta C. Halderman *et al.* were defendants in error, reversed the judgment of the court of common pleas, and remanded the cause for a new trial on the merits; and application is now made for leave to file a petition in error in this court to reverse the judgment of the district court.

R. D. McDougal, for the motion.

L. T. Neal, contra.

By THE COURT. April 18, 1883, the legislature amended section 6710, Revised Statutes, so as to provide, among other things, that "no judgment or final order of the district court . . . reversing a judgment or final order and remanding the cause or matter for a new trial on the merits or judgment or order rendered in the cause or proceeding

previous to such reversal, shall be reversed in the supreme court" (80 Ohio L. 169).

This section was, at the organization of the circuit courts, repealed and supplied by an amendment, February 7, 1885, and the latter was again repealed and supplied by an amendment May 4, 1885 (82 Ohio L. 36, 230).

In neither of the amendments of 1885 was any jurisdiction conferred on this court to review a judgment of the district court; and the jurisdiction it formerly possessed over the judgments of the district courts was taken away by the repeal of February 7, 1885, except so far as the same is saved by the operation of section 79, Revised Statutes, which is as follows: "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed; nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act." *O'Donnell v. Dowling*, 43 Ohio St. 62.

As this was not a pending proceeding on February 7, 1885, the only question is whether there was at that time an existing right to prosecute a proceeding in error in this court to reverse the judgment that is here sought to be reviewed.

The judgment complained of reversed the judgment of the court of common pleas; it was a judgment upon the merits; and the district court, in its judgment of reversal, remanded the cause for a new trial. Hence, when the act of February 7, 1885, was adopted, repealing the section as amended April 18, 1883, this court had, under the section repealed, no jurisdiction to reverse the judgment of the district court in a case like this, and it certainly acquired none by the repeal.

Holding as we do that this court has no power to reverse

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a judgment of the district court reversing a judgment of the common pleas and remanding the cause for a new trial upon the merits, where such judgment of reversal was rendered since the amendment of section 6710, Revised Statutes, made April 18, 1883, the motion is overruled without considering the errors assigned:

ANDERSON et al. v. GILCHRIST et al.

Revised Statutes, section 4162—Meaning of term "any former deceased husband."

ERROR to the District Court of Warren county.

A. G. McBurney, Thomas Millikin and James E. Campbell, for plaintiffs in error.

T. F. Thompson, J. E. Smith and Eltzroth & Thompson, for defendants in error.

BY THE COURT. The term "any former deceased husband," in section 4162, Revised Statutes, refers to *any* husband who has deceased leaving a widow to whom any real estate or personal property has passed by virtue of the provisions of said section, and is not confined in its application to cases where the widow has had two or more husbands who are deceased.

Judgment of the district court affirmed in part and reversed in part, and cause remanded to circuit court for further proceedings.

ROBINSON v. KANAWHA VALLEY BANK.

441 441
461 387*Bill of exchange—Acceptance by agent—Admissibility of parol evidence.*

The drawee of a bill of exchange, drawn by the "Kanawha & Ohio Coal Co.," was described in the bill as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co." *Held*, that the acceptance so made was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him, parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant so accepted the bill intending to bind the drawer as his principal, and that this fact was known to the plaintiff at the time it became the owner and holder of it.

ERROR to the Superior Court of Cincinnati.

The plaintiff below, the Kanawha Valley Bank, brought suit in the Superior Court of Cincinnati to recover against John A. Robinson as acceptor of the following bill of exchange:

"\$265.87.

KANAWHA & OHIO COAL CO.,
"COALBURG, W. VA., May 14, 1874.

"Seventy-five days after date pay to the order of J. D. Moore two hundred and sixty-five and 87-100 dollars.

"KANAWHA & OHIO COAL CO.,
By W. H. EDWARDS, *Pres't.*

"To JNO. A. ROBINSON, *Agent, Cincinnati, Ohio.*"

Written across the face of the bill was the following acceptance:

"Accepted, payable at Lafayette Bank, Cincinnati, Ohio.
"JNO. A. ROBINSON,
"Agent K. & O. C. Co."

The defendant answered: "That the bill of exchange sued on was drawn by the said Kanawha and Ohio Coal

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Company, a corporation, by its president, upon the defendant as the agent of said company, with the intent that it should be accepted by the defendant as agent so as to bind the said company and not the defendant individually; that as the agent of the said company, and for the said company, and not for himself, he accepted the said bill, and he was fully authorized by said company to accept said bill for said company; that the said bill was drawn for said company and received by the said payee for and on account of said company, and said payee then knew that the defendant was the agent of said company and accepted it for said company; that the plaintiff, when it received the said bill, well knew it was drawn upon the defendant as the agent of said Kanawha and Ohio Coal Company, and accepted by him as said agent for the said company, and not for himself, and drawn and accepted on account of the business of said company.

"The defendant therefore denies that he accepted the said bill, or is liable thereon as an acceptor, and prays judgment."

A jury was impaneled to try the issues made by a reply denying the averments of the answer. On the trial the court permitted the defendant to show that the initials "K. & O. C. Co." meant the "Kanawha and Ohio Coal Company," but rejected all the other testimony offered to support the averments of the answer; and the bill, with the acceptance, having been offered in evidence, directed a verdict for the plaintiff.

The verdict was rendered, and a motion for a new trial, on the ground that the court erred in rejecting the evidence offered by the defendant, and in directing a verdict for the plaintiff, having been made and overruled, to which the defendant excepted, judgment was rendered for the plaintiff.

These rulings of the court are assigned for error here, and the judgment is asked to be reversed.

Lincoln & Stephens, for plaintiff in error:

I. The draft, upon its face, shows that it was not intended to bind Robinson personally; but, on the contrary, that it was the company which was intended to be bound. The name of the company appears in bold letters upon the face of the draft, and also as the drawer. It appears from an inspection of the the paper that it was the intention, both of the drawer and Robinson, to give the acceptance of the company. The Kanawha bank knew of the agency of Robinson, and that he was in the habit of accepting for the company in the same form.

The court always lays hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intentions of the parties. *Carpenter v. Farnsworth*, 106 Mass. 561.

The following are some of the cases in which the persons who wrote the signatures were held not personally liable: *Ballou v. Talbot*, 16 Mass. 461; *Tucker Man. Co. v. Fairbanks*, 98 Mass. 104; *Tripp v. Swanzey Paper Co.*, 13 Pick. 291; *Fuller v. Hooper*, 3 Gray, 334; *Bank of British Am. v. Hooper*, 5 Gray, 567; s. c., 66 Am. Dec. 390; *Slawson v. Loring*, 5 Allen, 340; *Chipman v. Foster*, 119 Mass. 189; *Cutler v. Ashland*, 121 Mass. 558; *Goodenough v. Thayer*, 132 Mass. 152; *Hitchcock v. Buchanan*, 105 U. S. 416; *Post v. Pearson*, 2 Sup. Ct. Rep. 799; *Hovey v. Magill*, 2 Conn. 680; *Shelton v. Darling*, 2 Conn. 435; *Despatch Line of Packets v. Bellamy M'f'g. Co.*, 12 N. H. 205; s. c., 37 Am. Dec. 203; *Lacy v. Dubuque Lumber Co.*, 43 Iowa, 510; *Laftin & Rand Powder Co. v. Sinsheimer*, 48 Md. 415; Am. Lead. Cas. 633; *McClellan v. Reynolds*, 49 Mo. 312; *Means v. Swormstedt*, 32 Ind. 87; *Baker v. Chambles*, 4 Greene (Ia.), 428; *Hardy v. Pilcher*, 57 Miss. 18; *Babcock v. Beman*, 11 N. Y. 200; *Kean v. Davis*, 1 Zab. 683; s. c., 47 Am. Dec. 182; *Milligan v. Lisle*, 24 La. Ann. 144; *Webb v. Burke*, 5 B. Mon. 51; *Roberts v. Button*, 14 Vt. 195; *Brockway v. Allen*, 17 Wend. 40; *Conro v. Port Henry Iron Co.*, 12 Barb. 27; *Lazarus v. Shearer*, 2 Ala. 718; *Drake v. Flewellen*, 33 Ala. 106; *Bruce v. Lord*, 1 Hilt. (N. Y.) 248; *Early v. Wilkinson*, 9 Gratt. 68; *Haile*

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v. *Peirce*, 32 Md. 327; *Hood v. Hallenbeck*, 7 Hun, 362; *Amison v. Ewing*, 2 Cold. 366; *Owings v. Grubbs*, 6 J. J. Marsh. 32; *Johnson v. Smith*, 21 Conn. 627; *Andrews v. Estes*, 11 Me. 267; s. c., 26 Am. Dec. 521; *Stearns v. Allen*, 25 Hun, 558; *Barlow v. Cong. Soc.*, 8 Allen, 460; *Simpson v. Garlund*, 72 Me. 40; *Wallis v. Johnson School Township*, 75 Ind. 368; *Scanlan v. Keith*, 102 Ill. 634. See also Whart. Ag., secs. 291, 292, 293; Ang. & Am. Corp., sec. 295; Story Prom. Notes, sec. 69; Par. N. & B. 97.

II. Parol proof was admissible to show the meaning of the initials, the circumstances under which the contract was made, and the true nature of the transaction. *The Laflin & Rand Powder Co. v. Sinzheimer*, 48 Md. 411; *Hardy v. Pilcher*, 57 Miss. 18; *Lacy v. Dubuque Lumber Co.*, 43 Iowa, 510; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Kean v. Davis*, 1 Zab. 683; s. c., 47 Am. Dec. 182; 1 Am. Lead. Cas. 632, 633; Ang. & Am. Corp., sec. 293; 1 Dan. Neg. Inst., sec. 418; *Hood v. Hallenbeck*, 7 Hun, 362; *Brockway v. Allen*, 17 Wend. 40; *Conro v. Port Henry Iron Co.*, 12 Barb. 27; *Hale v. Pierce*, 32 Md. 327; *Haight v. Sahler*, 30 Barb. 218; *Brown v. Douglas*, 38 Barb. 312; *Early v. Wilkinson*, 9 Gratt. 68; *Scanlan v. Keith*, 102 Ill. 634; *Bean v. Pioneer Min. Co.*, 66 Cal. 451; *Bank of Newbury v. Baldwin*, 1 Cliff. 519; *Metcalf v. Williams*, 104 U. S. 97.

W. H. Mackoy, for defendant in error.

I. The words "agent K. & O. C. Co." are simply a description of the person. *Titus v. Kyle*, 10 Ohio St. 444; *Anderderton v. Shoup*, 17 Ohio St. 125; *Bank v. Cook*, 38 Ohio St. 442; *Tucker Man. Co. v. Fairbanks*, 98 Mass. 101; *Thomas v. Bishop*, 2 Strange, 955; *Hills v. Bannister*, 8 Cow. 31; *Barker v. Mec. Fire Ins. Co.*, 3 Wend. 94; s. c., 20 Am. Dec. 664; *Moss v. Livingston*, 4 N. Y. 208; *Taft v. Brewster*, 9 John. 334; s. c., 6 Am. Dec. 280; *Savage v. Rix*, 9 N. H. 263; *Stone v. Wood*, 7 Cow. 453; s. c., 17 Am. Dec. 529; *Fiske v. Eldridge*, 12 Gray, 474; *Slawson v. Loring*, 5 Allen, 340; *De Witt v. Walton*, 9 N. Y. 571; *Trask v. Roberts*, 1 B.

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Mon. 201; *Whitney v. Sudduth*, 4 Met. (Ky.) 297; *Parks v. President, etc.*, 4 J. J. Marsh. 456; *Caphart v. Dodd*, 8 Bush, 585; *Burbank v. Posey*, 7 Bush, 372; *Fogg v. Virgin*, 19 Me. 352; s. c., 86 Am. Dec. 757; *Pack v. White*, 78 Ky. 243.

II. An agent having authority to contract in the name of his principal, and intending so to contract, who uses words importing a personal engagement—although he describe himself as agent—binds himself, and not his principal. *Combes' case*, 9 Coke, 76, 77; *Titus v. Kyle*, 10 Ohio St. 444; *Potts v. Rider*, 3 Ohio, 71; *Tucker Man. Co. v. Fairbanks*, 98 Mass. 101; *Stone v. Wood*, 7 Cow. 453; s. c., 17 Am. Dec. 529; *Nicholls v. Diamond*, 9 Exch. 154; *Savage v. Rix*, 9 N. H. 263; *Leadbitter v. Farrow*, 5 M. & S. 345; *Taber v. Cannon*, 8 Met. (Mass.) 456; *Hopkins v. Mehaffy*, 11 Serg. & Rawle, 126; *Furnivall v. Coombes*, 5 M. & G. 736; *Appleton v. Binks*, 5 East, 148.

III. The intention of the party signing must be gathered from the instrument, and parol evidence is not admissible. *Titus v. Kyle*, 10 Ohio St. 444; *Anderton v. Shoup*, 17 Ohio St. 125; *Wilson v. Bailey*, 1 Handy, 177; *Trask v. Roberts*, 1 B. Mon. 201; *Bank v. Cook*, 38 Ohio St. 442; *Higgins v. Senior*, 8 M. & W. 834; *Whitney v. Sudduth*, 4 Met. (Ky.) 297; *Stackpole v. Arnold*, 11 Mass. 27; s. c., 6 Am. Dec. 150; 1 Dan. Neg. Inst., sec. 300.

IV. The court can not supply "as," "for," or any other operative word after "agent." It has been held in this state that "when the clause of a deed containing the covenant of seizin is blank as to the names of those who are seized, it does not amount to a covenant of seizin by the grantors." *Day v. Brown*, 2 Ohio, 345.

MINSHALL, J. It is apparent that the question presented is precisely the same as would have arisen on a demurrer to the answer, and we shall so treat it. Evidence as to the meaning of the initials, without the other circumstances, could in no way vary the rights and liabilities of the parties. If the facts stated in the answer constitute a defense,

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the defendant should have been permitted to prove the same, as he offered to do by the evidence ruled out. If not, then there was no error in rejecting it, and the judgment should be affirmed.

There is nothing in the answer to the effect that, at the time Robinson accepted the bill, he did not have funds of the drawer in his hands applicable to the payment of the bill at its maturity, or that he did not expect to have, and that this fact was known to the plaintiff when it became the owner of it. It is entirely consistent with the hypothesis that he was acting as the agent of the drawer at Cincinnati, a coal company doing business at Coalburgh, W. Va.; and that in the transaction of its business at Cincinnati, he then had, or expected to have, funds of the company in his hands applicable to the payment of the bill and on which it had been drawn. The relation of principal and agent may exist between drawer and drawee, without changing the rights of the payee against the drawee upon his acceptance of the bill. When the principal, located at one place, draws upon his agent located at another, the natural presumption is, from the usual course of business, that it is against funds of the principal that are, or will be, in the hands of the agent, and which the principal requests the agent to apply to the payment of the bill at its maturity. "A bill of exchange is presumed to be drawn on funds, with the understanding between drawer and drawee that it is an appropriation of the funds of the former in the hands of the latter, and acceptance is an admission that it was so drawn, and of such a relation between the parties." 1 Par. N. & B. (2 ed.) 323.

The usual relation between the drawee and the drawer is that of debtor and creditor; and such relation in fact exists between an agent and his principal, where the latter has funds in the hands of his agent. The bill here, as drawn and accepted, is consistent with and supposes such relation; and, as we have observed, there is nothing in the answer to the effect that such relation did not exist, nor was there any evidence offered to the contrary. Robinson

was not bound to accept; or he might have done so on condition that he had funds of the principal at the maturity of the bill, and thus have qualified his obligation. But as it is, his acceptance imports the possession of funds, and obliges him to pay the bill. 1 Par. N. & B. (2 ed.) 301, and note (w).

The fact that he is designated in the bill and described in his acceptance as agent, does not vary the case. This description of himself may, and no doubt did, serve a useful purpose in the settlement of his accounts with the company.

The law as to notes and bills, executed by persons acting as agents of other persons, is not uniform, but, as a rule, where one acting as agent uses words that import a personal agreement on his part, and signs his own name, it is held to be his individual obligation, although he describe himself as agent; the added words being regarded simply as a description of his person. The rule is in conformity to precision in the use of language, and secures that certainty in negotiable paper so necessary to commercial transactions. *Thomas v. Bishop*, 2 Strange, 955; *Barker v. Mec. Fire Ins. Co.*, 8 Wend. 94; Dan. Neg. Inst., § 300.

The question has been presented and so ruled in a number of the reported decisions of this court.

Thus, in *Titus v. Kyle*, 10 Ohio St. 444, where the makers had described themselves in the body of the note as directors of a certain turnpike road, and the note read, "One year after date, we, or either of us, as directors, etc., promise to pay," to which each signed his individual name, it was held that each was individually liable, and that in the absence of an averment of fraud or mistake, the makers could not be permitted to show an intention on their part not to bind themselves individually.

In *Collins v. Buckeye Fire Ins. Co.*, 17 Ohio St. 215, the note read, "I promise to pay, etc.," and was signed "Edward K. Collins, Agent." The defense was that the payee had notice of the agency of the maker, and that he was not lia-

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ble individually upon the note. But the court held that parol evidence was inadmissible for that purpose, and that Collins was personally liable upon the note. These cases show that, in this state, where one acting as agent signs his individual name to a note, that, by its language, imports a personal liability on his part, he is bound accordingly, although in signing the note he describes himself as agent.

We fail to see how it can make any difference in this respect whether the party signing describes himself as agent simply, or adds the name of his principal; in either case the principle upon which his liability is established and parol testimony excluded must be the same; the instrument upon its face is his own, and not the promise of his principal. To this rule usage has established an apparent exception, in the instances where a bill is drawn or accepted by the cashier of a bank. But it is rather apparent than real, since the custom by which a cashier represents his bank in such matters, by simply signing his own name, is so general, that the practice has reduced the custom to the certainty of a law, as it is every-where understood that, in such cases, whether he describes himself as cashier or not, he is an *alter ego* of the bank. His signature is a recognized mode in which a bank may become a party to commercial paper; and the obligation so created is that of the bank and not of the cashier.

There is a marked distinction between this case and those in which the question just discussed usually arises. Ordinarily the principal is some third person, not otherwise related to the bill, but here it is claimed that he is the drawer, and if the acceptance be treated as his, and not that of Robinson, the paper loses its character of a bill of exchange and becomes a promissory note only, and the payee, instead of having a fund appropriated to the payment of his demand or secured by the obligation of an acceptor, is reduced to the personal obligation of the drawer only. This aspect of the case, as unfavorable to the defense, has been commented on, and does not require to be further enlarged.

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The cases, however, to which we have adverted, show that a promissory note signed by an agent, in the manner this acceptance was made, becomes the individual liability of the agent, and would be decisive of this case, though the principal were a third party, unless an acceptance differs in principle from the making of a note, as does an indorsement. It seems that an indorsement may be explained by parol, as pointed out by Welch, J., in *Collins v. Buckeye Fire Ins. Co.*, 17 Ohio St. 224. The indorsement being a mere transfer of title, the obligation arising outside of it may be changed without affecting the indorsement itself. But the obligation of an acceptor is an express one; it is to pay the bill at its maturity according to the order contained in it. The language of the books is that the acceptor of a bill is as the maker of a note, and that when the drawer accepts he comes at once under an absolute obligation to pay the bill according to its tenor. 1 Par. N. & B., sec. 2, chap. 4. No distinction between a promissory note and an acceptance exists in this regard, and so it has been held, that the legal effect of an acceptance, as an absolute contract to pay, can not be varied by parol. *Heaverin v. Donnell*, 7 Smedes & M. 244; *s. c.*, 45 Am. Dec. 302; *Adams v. Wordley*, 1 M. & W. 374; *Hoare v. Graham*, 3 Camp. 57; 1 Par. N. & B. 301; *Cummings v. Kent*, 44 Ohio St. 92.

Judgment affirmed.

FOLLETT, J., dissents.

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Alimony after divorce in foreign jurisdiction.

A. and P. were married in West Virginia at their domicile, where A. retained his domicile, but P. went to Tennessee, where, in *ex parte* proceedings, she obtained a divorce *a vinculo* from A., but, as there was no personal service upon A., her application for alimony was dismissed without

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prejudice and to enable her to sue for it elsewhere. She then brought suit here for alimony alone, and to reach certain property in Ohio belonging to A.; in which case she obtained service upon A., who also appeared and filed pleadings in the case, and on trial the court found sufficient cause and allowed her alimony. *Held*, P. had a right thus to bring her action for alimony alone, and she could have her claim therefor determined, and, if sustained upon trial, the court could allow her reasonable alimony out of the property of A.

ERROR to the District Court of Belmont county.

Archibald Woods and Pauline V. Waddle were married August 22, 1872, at Wheeling, in West Virginia, the domicile of both, and where Archibald Woods has since resided. In the early part of 1874 they separated, and she went to the state of Tennessee, and on August 14, 1875, applied for divorce and alimony. On March 23, 1877, she obtained a decree "that complainant be and she is hereby divorced *a vinculo* from Archibald Woods, and is hereby restored to all the rights and liabilities of a *feme sole*, with her maiden name, Pauline V. Waddle, forever free from the control and dominion of Archibald Woods. But this cause is retained as to the matter of alimony and for no other purpose." And on July 1, 1880, the decree as to alimony was as follows: "It appearing that defendant is a non-resident, the court, on motion of the plaintiff, dismisses this cause as to alimony without prejudice to the plaintiff, so that she may be enabled to proceed in a foreign jurisdiction for recovery thereof, or do any other act necessary therein."

On February 19, 1881, she began suit in Belmont county, Ohio, for alimony only, alleging her *bona fide* residence in Ohio "for the year last past." She charged Archibald Woods with habitual drunkenness from the time of their marriage, and with extreme cruelty about January 10, 1874. She described certain land owned by him in that county, and asked for alimony and other equitable relief.

A demurrer to the petition was sustained in the court of common pleas, and the case was appealed to the district court. The district court overruled the demurrer, and on trial the court made the following finding and decree, viz :

"The court having heard the evidence and arguments of counsel, and being fully advised in the premises, find the defendant has been guilty of habitual drunkenness as alleged in the petition, and that by reason thereof plaintiff is entitled to alimony out of the estate of the defendant, Archibald Woods, and the court allows said plaintiff as reasonable alimony in money the sum of \$1,000. It is therefore considered, ordered, and adjudged by the court that the plaintiff, Pauline V. Waddle, recover from the defendant, Archibald Woods, the said sum of \$1,000, allowed her as alimony aforesaid, and that said defendant also pay the costs of this action, which are here adjudged against him. And the said judgment for \$1,000 and costs is hereby made a lien upon the farm described in the petition."

Plaintiff in error now seeks a reversal of the judgment.

John F. Kelly, for plaintiff in error.

After a *vinculo* divorce, alimony can not be granted by another court in an independent proceeding. Nor can it be allowed upon a foreign *ex parte* divorce, or after such divorce, or for cause which occurred before such divorce.

After the termination of the proceedings in Tennessee, the defendant in error could not obtain alimony in another jurisdiction for the same cause which enabled her to obtain her divorce. The Ohio courts had no jurisdiction, because Ohio is not the domicile of the parties, of the marriage, or of the *delictum*.

The Ohio statute provides for three kinds of alimony: (1) temporary alimony, known as alimony *pendente lite*, provided for in section 5701, Revised Statutes; (2) alimony without divorce, section 5702; (3) permanent alimony upon the granting of a divorce *a vinculo* and in the same proceeding, sections 5699, 5700.

If the wife petition for alimony alone, it can only be granted when the husband has committed one or more of the acts specified in section 5702. In such case it is not incident to a divorce, and is only allowed during the existence of the marriage relation, and not after the marriage

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has been dissolved. The Ohio cases support this construction. Act of 1853 (51 Ohio L. 377, § 10); *Jones v. Jones*, Wright, 155; *Hesler v. Hesler*, Wright, 210; *Bascom v. Bascom*, Wright, 632; *Johnston v. Johnston*, Wright, 454; Paige on Div. 290.

Exclusive of the separate maintenance provided by statute, section 5702, the principle is well established that alimony can not be granted in an independent proceeding when it is the only thing sought.

In England, prior to 1858, alimony was only given in and only followed a divorce *a mensa et thoro*.

The decisions in Alabama, California, Kentucky, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, and Virginia, concerning the granting of alimony alone, apply to and govern the doctrine of separate maintenance or separate support, which has its origin in the assumption by equity of this jurisdiction at a very early date, or is granted by statute. *Butler v. Butler*, 4 Litt. (Ky.) 201; *Galland v. Galland*, 38 Cal. 265; *Jamison v. Jamison*, 4 Md. Ch. Dec. 289; 2 Bish. Mar. & Div., secs. 358, 359, 361.

The court in *Cox v. Cox*, 19 Ohio St. 502, assumed jurisdiction on the ground that the application for divorce and alimony was made by the wife at her domicile and the *bona fide* domicile of both. The husband and wife were both domiciled in Ohio. The husband deserted his wife and went to Indiana for and procured an *ex parte* divorce. Here the wife deserts her husband and her *bona fide* domicile and procures an *ex parte* divorce in a foreign jurisdiction.

In *Cox v. Cox* the court relied upon *Mansfield v. McIntyre*, 10 Ohio, 30; *Richardson v. Wilson*, 8 Yerg. 67; *Crane v. Meginnis*, 1 Gill. & J. 463; s. c., 19 Am. Dec. 237; and *Shotwell v. Shotwell*, Sm. & M. Ch. 51, which, it is submitted, do not support it. The first named case and *Cooper v. Cooper*, 7 Ohio (2 pt.) 238, were not well considered and are opposed to the current of authority. Paige on Div. 369; *Harding v. Alden*, 9 Me. 140; s. c., 23 Am. Dec. 549.

In *Richardson v. Wilson*, *supra*, where alimony was granted after an *ex parte* legislative divorce, the court did not assume original inherent jurisdiction, but statutory jurisdiction. It is not applicable to the question involved in *Cox v. Cox*, or to the case at bar. *McBee v. McBee*, 1 Heisk. 558; *Rutledge v. Rutledge*, 5 Sneed, 554; *Nicely v. Nicely*, 3 Head, 184; *Swan v. Harrison*, 2 Cold. 534.

Crane v. Meginnis, *supra*, is not authority, because the chancery courts of Maryland assumed, from colonial times, and exercised at the time of the decision of that case, inherent jurisdiction to grant alimony. *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Jamison v. Jamison*, 4 Md. Ch. 289; *MacNamara's case*, 2 Bland. 566; *Helms v. Francisus*, 2 Bland. 544.

Shotwell v. Shotwell, *supra*, was overruled in *Lawson v. Shotwell*, 27 Miss. 630, which was followed and approved in *Bankston v. Bankston*, 27 Miss. 692.

Cox v. Cox is not supported by the cases cited and is not authority for the proposition that alimony can be granted after a divorce. It is authority on two points: (1) the domicile of the wife is not affected by the husband's desertion; (2) where a person leaves his domicile and procures an *ex parte* divorce in another jurisdiction, it is fraudulent and not valid at the domicile. *Van Fossen v. State*, 37 Ohio St. 317. This ground and *Cox v. Cox* is supported by *Hoffman v. Hoffman*, 46 N. Y. 30; *Shannon v. Shannon*, 4 Allen, 134; *Smith v. Smith*, 13 Gray, 209; *Leith v. Leith*, 33 N. H. 20; *Kerr v. Kerr*, 41 N. Y. 272; *Commonwealth v. Blood*, 97 Mass. 538; *Borden v. Fitch*, 15 John. 140, but not by the cases cited.

In *Bowman v. Worthington*, 24 Ark. 529, the wife left her husband's domicile and obtained a legislative divorce in Kentucky and then commenced proceedings for alimony in Arkansas, the husband's domicile. The court held that "alimony being an incident to the divorce, courts can only allow it in connection with the decree of divorce, and have no power to decree it on a separate application for alimony," reviews all the cases, repudiates *Richardson v. Wilson*, *supra*,

approves *Fischli v. Fischli*, 1 Blackf. 360, and holds the position taken by the courts of Virginia, Kentucky, South Carolina, and Alabama to be against principle and authority.

Alimony is an incident to a divorce. *Fischli v. Fischli*, *supra*; *Moon v. Baum*, 58 Ind. 194; *Muckenburg v. Holler*, 29 Ind. 139; *Chestnut v. Chestnut*, 77 Ill. 346; *Trotter v. Trotter*, 77 Ill. 510; *Prosser v. Warner*, 47 Vt. 667; *McGee v. McGee*, 10 Ga. 477; *Goss v. Goss*, 29 Ga. 109; *Blythe v. Blythe*, 25 Iowa, 266; *Harshberger v. Harshberger*, 26 Iowa, 503; *McEwen v. McEwen*, 26 Iowa, 375; *Cole v. Cole*, 23 Iowa, 433; *Graves v. Graves*, 36 Iowa, 310.

The same rule prevails in Maine: *Jones v. Jones*, 18 Me. 311; *Henderson v. Henderson*, 64 Me. 419; *Littlefield v. Paul*, 69 Me. 533. And in Massachusetts: *Shannon v. Shannon*, 2 Gray, 287; *Baldwin v. Baldwin*, 6 Gray, 342; *Coffin v. Dunham*, 8 Cush. 405. And in Michigan: *Peltier v. Peltier*, Har. Ch. 19; *Perkins v. Perkins*, 16 Mich. 162; *Wright v. Wright*, 24 Mich. 180.

It is the law of Missouri: *Simpson v. Simpson*, 31 Mo. 24; *Doyle v. Doyle*, 26 Mo. 545, 549. It is the rule in New Hampshire: *Parsons v. Parsons*, 9 N. H. 317; *Sheafe v. Sheafe*, 24 N. H. 567. And in New Jersey: *Yule v. Yule*, 2 Stock. 138; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 146; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Rockwell v. Morgan*, 2 Beas. 119; *Anshutz v. Anshutz*, 1 C. E. Green, 162; *Cory v. Cory*, 3 Stock. 400. And in New York: *Atwater v. Atwater*, 53 Barb. 621; *Perry v. Perry*, 2 Paige, 501; *Lewis v. Lewis*, 3 John Ch. 519. And in Vermont: *Harrington v. Harrington*, 10 Vt. 505. And in England: *Winstone v. Winstone*, 2 Swab. & F. 246.

The Tennessee divorce can not be received in Ohio as the basis for alimony, because Tennessee was not the *bona fide* domicile of both, or either of the parties, nor the place of *delictum*, nor the place of the marriage. *Van Fossen v. State*, 37 Ohio St. 317; *Shannon v. Shannon*, 4 Allen, 134; *Smith v. Smith*, 13 Gray, 209; *Leith v. Leith*, 39 N. H. 20;

Kerr v. Kerr, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30.

L. Danford, for defendant in error.

That alimony, in Ohio, is an independent remedy, which may be pursued by itself, where a divorce is not sought, is a proposition too plain for discussion. Every section of the chapter of the statutes on the subject of divorce and alimony shows it. See a discussion of the subject in *Graves v. Graves*, 36 Iowa, 310; *s. c.*, 14 Am. Rep. 525; Bish. Mar. & Div., sec. 350.

When we get the distinction between the old English rule that alimony is a mere incident to a divorce and the Ohio statute thoroughly in mind, we have cleared away the difficulty that surrounds the case. See *Rogers v. Rogers*, 15 B. Mon. 364; 14 Am. Law Rep. 311; Walker & Bates Dig. 35; Bish. Mar. & Div., sec. 360.

FOLLETT, J. It is not claimed that Pauline V. Waddle was not rightly divorced and restored to her maiden name; neither is it claimed that her right to alimony had ever been passed upon in any prior action.

It is not questioned that the amount of the alimony decreed is just and reasonable.

If she had not been divorced she was the wife of plaintiff in error; and, if residing in Belmont county, without doubt as a wife, under section 5702 of the Revised Statutes, she could file her petition for alimony alone. Section 5702 provides . . . ; "the wife may file her petition for alimony alone, or, if a petition for divorce has been filed by the husband, she may file her cross-petition for alimony, with or without a prayer for the dissolution of the marriage contract," and "habitual drunkenness" is specified as a cause for alimony. The old English doctrine that "alimony has no independent existence," is not the law of Ohio.

As to *where* and by *whom* a petition for alimony may be filed, section 5690 of the Revised Statutes provides as follows:

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"The plaintiff, except in an action for alimony alone, shall have been a resident of the state at least one year before filing the petition; all actions for divorce, or for alimony, shall be brought in the county where the plaintiff has a *bona fide* residence at the time of filing the petition, or in the county where the cause of action arose; and the court shall hear and determine the same, whether the marriage took place or the cause of action occurred, within or without the state."

No question is made by the record as to her alleged *bona fide* residence in Belmont county, as is required by law. The record shows legal service and the personal presence of the parties in court.

The language of the statute is: "The court shall hear and determine the same, whether the *marriage* took place or the *cause* of" divorce (or, as here, alimony) "occurred within or *without* the state." And the court found the plaintiff in error "guilty of habitual drunkenness, as alleged in the petition." This is the "*cause*" for alimony.

Thus the language of the statute answers nearly all the questions presented in this case.

It is not claimed that this woman's right to alimony had been passed upon by any court; and the Tennessee court, not having jurisdiction of this matter, did not pass upon it, and it could not adjudge alimony in that case. 2 Bish. Mar. & Div., sec. 170; Whar. Ev. 818.

So far as appears the action in Belmont county was the *first* in which the defendant in error could recover alimony from the plaintiff in error, and no limitation is claimed. But the words of the statute (§ 5702 Rev. Stat.) are: "the *wife* may file her petition for alimony alone." May the word "*wife*," as used in this statute, include a woman divorced, as was this defendant in error?

In the case of *Cox v. Cox*, 19 Ohio St. 502, this court allowed the benefits of this statute to a woman whose husband had been divorced from her by a court in Indiana, while she remained domiciled in Ohio. In that case, on page 512, White J., said: "It is not essential to the allow-

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ance of alimony that the marriage relation should subsist up to the time it is allowed. On appeal, alimony may be decreed by the district court, notwithstanding the subsisting divorce pronounced by the court of common pleas. It is true the statute speaks of the allowance as being made to the wife. But the term 'wife' may be regarded as used to designate the person, and not the actual existing relation; or the petitioner may still be regarded as holding the relation of wife for the purpose of enforcing her claim to alimony."

He thus shows that the word *wife* designates the person divorced after the divorce is granted. He further considered the questions at length and the court there held: "That the decree of divorce was no defense to her petition for alimony." The principles there stated and held sustain this judgment.

Here there is no showing of fraud on the part of the defendant in error, nor any claim that the plaintiff in error has been wronged by having the alimony suit tried in a separate action.

We think that, under the law of this state, the district court, in allowing alimony to the defendant in error, did not err.

Judgment affirmed.

THE STATE *ex rel.* ATTORNEY-GENERAL v. BRYSON.

Municipal corporations—Power of suspension and appointment of fire engineer by mayor.

Where, under an ordinance of the city of Columbus, which creates the office of fire engineer, and provides "that such officer shall be appointed by the mayor, by and with the advice and consent of the city council of said city, on the first Monday of June, A. D. 1871, and annually thereafter, and shall hold the office for the period of one year, and until his successor is appointed and qualified;" and further provides that "all vacancies in said office shall in like manner, immediately upon the vacancy occurring, be filled by appointment for the unexpired term, and until a successor is appointed and qualified;" and which further provides, "the mayor shall immediately upon making any such appointment, report the name of such appointee to the city council of said

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city for its action thereon;" and further provides that the person so appointed shall qualify by taking an oath and giving a bond to be approved by the mayor, a person has been duly appointed for a full term by the mayor by and with the advice and consent of the council, and has qualified, such term does not expire until a successor has been appointed by the mayor by and with the advice and consent of the council, and has qualified; and there is no power given by such ordinance to the mayor, under such circumstances, to declare a vacancy, nor to suspend such incumbent, nor to appoint another in his place; nor is any such power given by statute except for neglect of duty, misconduct in office, or other sufficient cause. Hence, an attempt by the mayor, under such circumstances, to suspend such incumbent by declaring a vacancy and appointing another person to the place, is inoperative, and gives such other person no right or title to such office as against such incumbent.

QUO WARRANTO.

The action is brought to determine the right of the defendant to the office of fire engineer of the city of Columbus.

It is alleged in the petition, in substance, that the defendant has intruded himself into and usurped and unlawfully holds that office, and is assuming to exercise the powers, duties, and functions thereof, and to control, manage, and operate the fire department of the city without authority of law, and to the great danger of the property of the city, and to the prejudice of the state; that about June 1, 1885, one David D. Tresenrider was by the mayor duly appointed fire engineer, which appointment being soon thereafter confirmed by the city council, said Tresenrider duly qualified and gave bond and entered upon the discharge of the duties, and has since been and now is entitled to exercise the powers, duties, and functions of the office, but the same have been unlawfully usurped by the defendant. A prayer for judgment ousting defendant and inducting Tresenrider follows.

The answer does not deny the appointment, confirmation, qualification, etc., of Tresenrider, but avers that his term expired on the 7th day of June, 1886, and that on the 5th day of June the mayor appointed the defendant to the

office, and forthwith reported his name to the council for its action; that the council has refused to take any action upon the nomination except to refer the same to a committee; that a majority of the members of the council, in a secret and unofficial caucus, resolved that they would not advise and consent to the appointment of any person other than Tresenrider, and since refuse to act upon the appointment; that on the 22d day of June, the defendant gave bond and duly qualified as such engineer, and, by direction of the mayor, proceeded on that day to take possession of the office, which Tresenrider then surrendered to him, and he has since continued to perform the duties.

The reply denies that Tresenrider's term had expired, and alleges that by virtue of the ordinance he continued the lawful incumbent until his successor should be appointed and qualified; denies that the mayor had any power to appoint to the office except by and with the advice and consent of the council, which has never advised or consented to the appointment of defendant, but has rejected it; alleges, in substance, that on the 22d day of June the mayor, without right and without cause, undertook to, and by an order issued and served on Tresenrider, did temporarily suspend him and appoint the defendant; denies that Tresenrider surrendered the property, etc., of the office to defendant, except under the above order, and alleges that such suspension and appointment being by the mayor reported to the council at its regular meeting, June 28th, that body refused to concur, and passed a resolution to that effect, and on the next day a copy of the resolution was served on the defendant and a demand made on him by Tresenrider to surrender the office, which he refused to do. A copy of the ordinance is given in the reply; also copy of the order of the mayor to Tresenrider of 22d June; also copy of the mayor's communication to the council of 28th June, and of the resolution of non-concurrence of same date.

By an agreed statement, signed by the counsel of each party, it is admitted that on the 5th June, 1886, the mayor

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sent a communication to the council nominating the defendant as fire engineer; that at the next meeting of the council the nomination was duly referred to the regular committee on fire department, and the same was still pending in the committee on the 22d day of June, when the mayor issued his order suspending Tresenrider and appointing the defendant, and the original nomination is still awaiting the action of that committee. At the next regular meeting of council, June 28th, the mayor communicated his action to the council, and on that date that body refused to confirm the action of the mayor. No further action has been taken by the council in the premises.

The office of fire engineer was created by the ordinance referred to, which is as follows :

“Section 1. *Be it ordained by the city council of Columbus,* That it is deemed expedient to create, and there is hereby created, the office of fire engineer of the city of Columbus; that such officer shall be appointed by the mayor, by and with the advice of the city council of said city, on the first Monday of June, A. D. 1871, and annually thereafter, and shall hold his office for the period of one year, and until his successor is appointed and qualified, and all vacancies in said office shall in like manner, immediately upon the vacancy occurring, be filled by appointment for the unexpired term, and until a successor is appointed and qualified. The mayor shall immediately, upon making any such appointment, report the name of such appointee to the city council of said city for its action thereon; the fire engineer shall perform the duties prescribed in the act entitled ‘an act to provide for the organization and government of municipal corporations,’ passed May 7, 1869, and the acts amendatory thereof and supplementary thereto, as well as the duties prescribed by this or any other ordinance of the city; the person so appointed shall be an elector of the city of Columbus, and before entering upon the duties of his office shall take an oath or affirmation to support the con-

stitution of the United States and the State of Ohio, and also an oath or affirmation of office, and shall also execute a bond to the city of Columbus, in the sum of \$5,000, to be approved by the mayor, conditioned for the faithful performance of the duties of his office, which bond shall be deposited with the clerk of the corporation, and shall be by the clerk, with the approval indorsed thereon, recorded, filed, and preserved in his office; the said fire engineer shall receive as compensation for his services the sum of \$1,000, payable monthly from the city treasury."

The mayor's order of suspension to Tresenrider, of date June 22d, was of tenor following:

"Your term of office as fire engineer having expired, Charles Bryson has been appointed by me to the same office, and will, after 12 m. to-day, be recognized and obeyed as the fire engineer of this city. You will, therefore, at the hour above named, turn over to Mr. Bryson all property in your possession belonging to the city of Columbus, Ohio."

The mayor's communication to the city council, of date June 28th, was of tenor following:

"I have the honor to report that on Tuesday, June 22, 1886, by virtue of the authority and direction of your honorable body, I, the mayor of the city, appointed Charles Bryson fire engineer of this city, *vice* David D. Tresenrider, whose term of office had expired. At 12 m. on the day above mentioned, the newly-appointed engineer, Charles Bryson, assumed control of the city fire department, and is now running it. Hoping my action will meet with your approval." Signed officially.

The resolution of the council of same date was as follows:

"*Resolved*, by the city council of the city of Columbus, That the action of the mayor in respect to the suspension of D. D. Tresenrider from the office of fire engineer of the city of Columbus, and the appointment of Charles Bryson to fill the temporary vacancy, be not concurred in."

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E. L. Taylor and D. F. Pugh, for relator.

The successor can only be appointed and qualified when the provisions of the ordinance are complied with, *i. e.*, when he has been appointed by the mayor and the appointment has been confirmed by the city council. The mayor may for "neglect of duty, misconduct in office, or other sufficient cause" temporarily suspend the fire engineer, but this does not, of itself, divest him of his legal title to the office. By having the suspension removed he takes possession again by virtue of his original title. *State v. Heinmiller*, 38 Ohio St. 101, 108.

The power of the mayor temporarily to suspend under section 1749 of the Revised Statutes *must be for cause*. It is not an arbitrary power.

The mayor's order suspending Tresenrider, inasmuch as it failed to specify any grounds for suspension, was without authority of law and void. It follows that the order appointing Bryson was a nullity. It never has had any validity and Bryson could acquire no rights under it.

It is contrary to the policy and the spirit of our laws that an officer may be removed without cause and without an opportunity of being heard. Section 1685, Revised Statutes; *State v. Bryce*, 7 Ohio (2 pt.) 82; *Murdock v. Phillips Academy*, 12 Pick. 244; *People v. Cooper*, 57 How. Pr. 416.

All the powers and duties of the mayor are conferred, either expressly or derivatively upon him by the statutes. Dillon Mun. Corp. 208.

The power of removal is exclusively vested in the council. Section 1685, Revised Statutes.

George K. Nash, for the defendant.

The only question before the court is this: When the term of office of fire engineer has expired, can a new appointee by the mayor, duly made and reported to the council, under any circumstances take possession of the office before the council has advised and consented to such appointment?

The council has wholly refused to perform its duty ; and if the stand which it has taken is sustained, the mayor will be wholly deprived of the right, which is conferred upon him in the ordinance of the city, to name the fire engineer, and the council can assume to make the appointment as well as to advise and consent to it.

Suppose that a vacancy arises by death in the office of fire engineer instead of by expiration of term, and council neglects to take any action upon the mayor's appointment, certainly the appointee could assume control of the department until the council saw fit to act.

The only limitation found in the ordinance upon the right of the appointee to take and exercise the duties of the office is, that he shall take an oath of office and give bond. As soon as the name is sent by the mayor to the council the appointment is made, although it has not been advised and consented to by the council.

SPEAR, J. The facts necessary to a determination of the case sufficiently appear in the allegations of the pleadings not denied, and in the agreed statement.

Inasmuch as it is admitted that Tresenrider had been duly appointed, confirmed, and qualified as fire engineer, as stated in the petition, the burden of maintaining Bryson's claim to the office is properly cast upon him. It will be observed that the mayor undertook to declare a vacancy and to appoint Bryson to fill it. Was he vested with power to do this? The defendant rests his claim upon the order of the mayor, hereinbefore given, and the provisions of the ordinance, and expressly disclaims that the mayor undertook to act, in his order of June 22, 1886, under section 1749 of the Revised Statutes. This is the section which gives the right to a mayor to suspend for "neglect of duty, misconduct in office, or other sufficient cause," and appoint another to fill the temporary vacancy, and that "all such suspensions, and the cause thereof, and all such appointments, shall be by him reported to the council for their action at the next regular meeting thereafter."

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The contention is that the facts, under a proper construction of the ordinance,* show a vacancy to have occurred which the mayor might lawfully fill, and, upon this assumption, it is insisted that the only question before the court is this: "When the term of office of a fire engineer of Columbus has expired, can a new appointee by the mayor, duly made and reported to the council, under any circumstances take possession of the office before the council has advised and consented to such appointment?" It is urged that this question should be answered in the affirmative. Illustrative of the force of this claim a supposed case is put of a vacancy caused by the death of an occupant of the office, and a name at once sent in to council by the mayor, upon which the council neglects to take any action for months; if the appointee may not take charge of the office until confirmed, the fire department would be left without a head to direct its movements, leading to a lamentable state of affairs, and it is insisted that the cause of good order requires an affirmative answer; that such appointee should assume control of the department and continue until the council does act. It is urged, further, that by the language of the ordinance it is shown that the appointment is made when the name is sent in by the mayor to the council, although that body has not advised and consented to it; that any time after the appointment by the mayor the appointee may take the proper oath, give the required bond, and get the mayor's approval thereof, which steps appear to be the only limitations on the appointee taking the office after his appointment; that the words "so appointed" refer to the act of the mayor in making the appointment, and not to that of the council in advising and consenting to it. This position is based upon the theory that a vacancy has actually occurred.

Unfortunately for this construction, the language of the ordinance will not admit of it. That instrument provides that "such officer shall be appointed by the mayor by and with the advice and consent of the city council of said city, on the first Monday of June, A. D. 1871, and annually

thereafter, and shall hold his office until his successor is appointed and qualified." It would seem clear that when the ordinance has provided a mode of appointment, to wit, "by the mayor by and with the advice and consent of the city council," and that the engineers shall hold "until his successor is appointed and qualified," there is hardly room for doubt that the purpose was to require, as a necessary element in an appointment, the consent of council; or for doubt that before the tenure of one who has been appointed by the mayor and confirmed, and has qualified for a regular term, can be considered as at an end, not only must the year have elapsed, but his successor must have been, in like manner, appointed and confirmed and qualified. The tenure might expire at the end of a year by the appointment and confirmation and qualification of a successor, but if no successor be so constituted, the incumbent continues as the lawful and rightful possessor of the office. If, in a strictly technical sense, the "term" may be said to have expired, that would not determine the right to hold the office; nor would a vacancy in the office necessarily result, because the expiration of a "term," used in this narrow sense, does not always create a vacancy in the office. We are not dealing with a case where the office is limited by the constitution, or even by the law, to a holding of one year only. The section of the Revised Statutes, 1709, which provides for the selection of city officers, fixes the term of those who are appointed at one year, except as otherwise provided, and section 1713 provides for the continuance of the incumbent in office until his successor is qualified. And while it may be admitted that in a case where the term is, in the manner above suggested, limited to a stated time, with no provision for a longer holding, a vacancy would ensue at the expiration of the term if no successor had then qualified, such a condition of things is not here presented. The office could not be regarded as vacant while filled by one lawfully entitled to it, nor could an appointment made ostensibly to fill a vacancy, create one. It is manifestly

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the design of the ordinance to secure to such office an incumbent who possesses the confidence and approval, not only of the mayor, but also of the city council. Beyond this, the engineer is to hold his office, not only for one year, but "until his successor is appointed and qualified." The successor is one who is to take the place. The language implies that he is to succeed to all that the other enjoyed. A mere *ad interim* appointee, not confirmed, is in no true sense the successor of one who has had a full term. To assume that one who is simply nominated by the mayor becomes a "successor," is to ignore an important feature of authority which the real successor is to have; he is not only to be clothed with such authority as his designation by the mayor gives him, but with the approval of the council as well. Length of term also is an important right held by one who is really appointed. Even though the mayor's appointee should take possession of the office he would have to retire unless the council approved. The mayor's nomination alone could give him no right to continue, and without that right he could not enjoy the term provided, and could not be, in the fullest legal sense, a "successor." Besides, as no other mode of clothing such person with the power of a successor is pointed out, it results that he is to be so constituted in the same manner, and with the same acquiescence of council, that was necessary to constitute the predecessor a fire engineer. The term, "until his successor is appointed and qualified," in this ordinance, therefore, should have the same effect as though it read, "until his successor is, in like manner, appointed and qualified." The manner in which an appointment is brought about, within the meaning of the ordinance, being given in the first instance, it is but natural to apply to the term "appointed" the same signification in the succeeding passages of the ordinance as attaches to it where first used. The term, "person so appointed," it seems to us, can have reference only to the person appointed in the mode pointed out in the ordinance by the preceding provisions, and can

not be held to imply one appointed by less formality than is there made necessary.

This court held, in *The State v. Howe*, 25 Ohio St. 588, that "where an officer appointed by the governor, by and with the advice and consent of the senate, is authorized by law to hold his office for a term of three years, and until his successor is appointed and qualified, and no appointment of a successor is made by the regular appointing power at the expiration of his term of three years, the office does not become vacant; but the incumbent holds over as a *de jure* officer until his successor is duly appointed and qualified," and no reason is perceived why this rule would not control the case at bar.

As regards an appointment to fill a vacancy, it is not apparent that any different course of proceeding has been provided for. After making provision for the appointment of a successor to an engineer holding for a full term, and indicating what steps are necessary to complete such an appointment, the ordinance next provides that "all vacancies in said office shall in like manner, immediately upon the vacancy occurring, be filled by appointment for the unexpired term, and until a successor is appointed and qualified." This seems to require precisely the same formality of action by the council, whether the appointment be for a full term or to fill a vacancy. Then follows the language: "The mayor shall, immediately upon making any such appointment, report the name of such appointee to the city council for its action thereon." This necessity for submission to council apparently applies not less to an appointment to fill a vacancy than to one made the first Monday of June, and enjoins upon the mayor no greater duty in the one case than in the other. Again, by an appointment to fill a vacancy, as well as by the yearly appointment, the appointee is given the valuable right, not only to hold the office for a given time, but "until a successor is appointed and qualified."

If this construction of the ordinance be the proper one, inasmuch as "all vacancies" would seem to include

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one occasioned by death as well as one brought about by other means, it would appear that the language of the ordinance itself furnishes an answer to the case put by counsel, though we can hardly regard it as arising in this case. The court is not called upon to hold what would be the power or duty of the mayor in case of a vacancy occasioned by death. Whether or not, in such an emergency, there might be found in the statutes some general grant of power to the mayor to direct a person to take charge of the department temporarily, and whether or not, if there exists such power, the person so authorized could be regarded as a "fire engineer," we need not here consider. As to the suggestion of danger from long delays, it is difficult to see how that consideration aids in giving construction to the ordinance, for there is no apparent reason why the law should assume that there would follow unnecessary or unreasonable delay in the action of the council in such emergency any more than in the action of the mayor. The members of that body are chosen from the same constituency that selects the chief executive officer, and it is hardly to be presumed that they would not bring to the discharge of their duties the same high sense of devotion to the public good which would actuate the mayor. The following, from the opinion of Birchard, J., in *The State v. Choate*, 11 Ohio, 513, would seem to apply to a city government as well as to that of the state: "Arguments of this nature, which assume the possibility that a co-ordinate branch of government will wantonly violate its plain duty, ought to be held of little weight in a court of justice, where the legal presumption obtains that every public functionary will faithfully observe the obligations of duty imposed upon him by his oath of office." However this may be, the case before us is a wholly different one, and is, as we think, clearly covered by the terms of the ordinance. The fire engineer in office held under his appointment until his successor—one in the sense hereinbefore indicated—should be appointed and qualified. The nomination by the mayor not having been consented to by the council, no successor had been

appointed. Hence the term of the incumbent had not expired, and there was no vacancy.

This view of the limitations upon the power of the mayor seems to be in accord with the spirit of our statutes upon the subject of municipal corporations. The ordinance was authorized by the statute, is in subordination to it, and it is to be presumed that the council, in passing it, was fully apprised of the law, especially as a direct reference to it is embraced in the ordinance itself. Section 1749, before referred to, makes adequate provision for suspension by the mayor for neglect, misconduct, or other sufficient cause. By clear implication there must be ground for such action before the mayor can suspend. Neither by the statute nor by the ordinance, nor by both, is that officer vested with arbitrary power to suspend or remove at will. He may suspend for statutory cause; he may not without such cause. And when he assumes to act for cause he is authorized to appoint another person to fill the temporary vacancy; and the requirement that all such suspensions and the cause thereof, and all such appointments, shall be reported to council at the next regular meeting, is for the purpose of invoking the supervisory action of council in the premises. That body may, in its discretion, approve or disapprove such suspension, and the disapproval terminates the vacancy, and the person appointed to fill it ceases to be an officer of the city. *State v. Heinmiller*, 38 Ohio St. 101. The purpose of the statute is further shown by reference to other sections of the title (XII), which treats of municipal corporations. Sections 2474, 2475, and 2476 recognize the office of fire engineer, and make provision as to his duties and compensation. Section 1685, same title, provides that an officer "appointed by authority of this title, except as otherwise provided therein, may be removed from office at the pleasure of the council by a vote of a majority thereof;" but in no case is a removal to be made unless a charge in writing is preferred and opportunity given to make defense. The statute and the ordinance will thus be found to supplement each other. The ordinance furnishes

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what the statute lacks, to wit, a mode of appointment and qualification; and the statute supplies what is not provided in the ordinance, to wit, a mode of suspension and removal; but there is no power given the mayor anywhere in the statutes to remove, and none to suspend except for cause, as before shown; and it is manifest that the spirit of the statute forbids the attempt to exercise such power by that officer.

The allegations as to the misconduct of a portion of the council contained in the answer, and the insinuations of improper motives made upon the other side in the brief, we do not regard as affecting the question in any way. The court can not, in this case, consider the motives, nor private desires, nor designs, of either branch of the city government. We deal with official acts and determine their legal effect, but not with private or unofficial acts. The ordinance gives to the mayor the selection of a person for fire engineer. His position as chief executive officer of the municipal government would suggest that he possesses superior knowledge of the situation and needs of the fire department, and sufficient knowledge of the qualifications necessary to a satisfactory discharge of the duties of fire engineer, and it is not unreasonable to assume that the framers of the ordinance contemplated that all nominations to that office would be made with a purpose of conserving the public good, and that, in the ordinary course of business, the council would be content to apply but one test, viz., that of fitness, to any nomination made for that office, leaving the responsibility of change, if any, where the ordinance seems to have left it, with the mayor. If, in the performance of these duties, any have been governed by improper motives leading to unjustifiable conduct, the parties are not amenable to the court in this case, but to public opinion and to their constituents.

There being no vacancy in the office of fire engineer, June 22, 1886, and no power in the mayor to declare one or to suspend the incumbent, it follows that the action of the mayor in his order of above date, addressed to David D.

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Tresenrider, was invalid and without warrant of law, and that the defendant obtained no right nor authority under it. Tresenrider has, therefore, been, from his appointment in June, 1885, and continues to be, the fire engineer of the city of Columbus, and entitled to be recognized as such.

Judgment of ouster against Boyson and of induction of Tresenrider, as prayed by the relator.

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 RAILWAY COMPANY v. SPANGLER.

Master and servant—Negligence of fellow-servant—Power of railroad company to contract against injuries arising from.

The liability of railroad companies for injuries caused to their servants by the carelessness of other employes who are placed in authority and control over them, is founded upon considerations of public policy, and it is not competent for a railroad company to stipulate with its employes at the time, and as part of their contract of employment, that such liability shall not attach to it.

ERROR to the District Court of Lucas county.

Spangler, the defendant in error, was a brakeman on a freight train of the Lake Shore and Michigan Southern Railway Company. While in the line of his duty he was injured, without his fault, and by reason of the negligence of the conductor of the train. He brought his action for damages for the injury so received. The company alleged for defense, among other things, "that at the time of the hiring of plaintiff by defendant as a brakeman upon her trains of cars, as in the petition alleged, and as a part of the terms of said hiring, and in consideration thereof, plaintiff entered into an agreement and stipulation in writing with Spangler," which contained the following stipulation:

"Second, that while the company will be responsible to me for the discharge of all its duties and obligations to me, and for any fault or neglect of its own, or of its board of

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directors or general officers, which are the proximate cause of injury, yet it will not be responsible to me for the consequences of my own fault or neglect, or that of any other employes of the company, whether they or either of them are superior to me in authority, as conductor, foreman, or otherwise or not." The evidence tended to support this defense.

The trial court refused, upon request of the company, to charge the jury that, "if the jury find from the testimony that the plaintiff, at the time he was employed by the defendant as a brakeman, executed and delivered to the defendant the stipulation, a copy of which is set out in the answer, and that the same was accepted by the defendant, by and through its proper officer or agent, then the defendant is not liable for the alleged negligence of the conductor complained of in the petition," assigning as a reason for the refusal that, in the opinion of the court, such stipulation was not binding upon the plaintiff below, it being against public policy.

A judgment of recovery by Spangler was affirmed on error in the district court.

This judgment is now sought to be reversed for alleged error in affirming the judgment of the trial court.

The refusal of the latter court to charge the jury as requested is now assigned for error. Upon the question thus presented the court rests the disposition of the case.

C. H. Scribner (with whom were *Ashley Pond* and *O. G. Getzendanner*), for plaintiff in error.

The question is not whether a company may contract against liability for its own negligence. It is not claimed that it may, by contract, exempt itself from liability for negligently employing, or keeping in its service, an incompetent conductor; or for negligently furnishing dangerous or defective machinery; or for not keeping its roadway in proper repair. But, having exercised due care in all these respects, may it not stipulate against the consequences of negligent acts of a conductor, such as here complained of?

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Why not? In many of the states, the conductor is considered a co-servant of the brakeman for casualties arising solely from the negligence of the conductor. The courts of this state have refused to extend the doctrine making the company liable, beyond the limits of the rule laid down in earlier cases. See the opinion of the court in *Pittsburg, etc., Ry. Co. v. Devinney*, 17 Ohio St. 197.

Such a rule is calculated to better protect the public against injuries to merchandise in course of transportation by promoting greater diligence and watchfulness on the part of the brakemen employed upon the trains.

There are several authorities which support the proposition here maintained. *Mitchell v. Penn. R. Co.*, 1 Am. L. Reg. 717; *Galloway v. Western, etc., R. R. Co.*, 57 Ga. 512; *Western, etc., R. R. Co. v. Bishop*, 50 Ga. 465; *Western, etc., R. R. Co. v. Strong*, 52 Ga. 461; *Hendricks v. Western, etc., R. R. Co.*, 52 Ga. 467.

Mr. Thompson, in his work on Negligence (vol. 2, p. 1025), and again in 1 Central Law Journal, 465, criticises these cases. His criticism, however, applies only where the company undertakes to stipulate against its own negligence in not providing competent superiors or safe machinery and appliances for the use of the servant. It has no application to a case like the present, where no negligence is charged against the company itself.

In the case of *Roesner v. Hermann*, 8 Fed. Rep. 782, it was held by Judge Gresham that an employer could not protect himself by contract with his employe against the consequences of his own negligence in not providing *safe and suitable machinery*. I do not claim that he can. But this case is criticised by the editor of the Albany Law Journal (24 Alb. L. Jour. 383), who cites the Georgia cases above referred to with approbation, and declares that he has no doubt the decision of Judge Gresham is wrong.

The question appears to have been thoroughly considered, and determined in accordance with the views here maintained in *Griffiths v. Earl of Dudley*, L. R. 9 Q. B Div. 357.

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It has been held in New York that "a contract between a railroad corporation and a gratuitous passenger by which the former is exempted from liability under any circumstances of the negligence of its agents, for an injury to the passenger is not against law or public policy and is valid."

Wells v. N. Y. Cent. R. Co., 24 N. Y. 181; *Perkins v. N. Y. Cent. R. Co.*, 24 N. Y. 196; *Bissell v. N. Y. Cent. R. Co.*, 25 N. Y. 442.

A like ruling was made in the case of *Kinney v. Cent. R. Co.*, 84 N. J. 513. Other cases hold a contrary doctrine.

The point has never been decided in Ohio. See *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1. The supreme court of the United States also declined to express an opinion upon this point in the case of *Railway Co. v. Stevens*, 95 U. S. 655, 660.

There is a wide difference between the case of a contract with a passenger, or a shipper of goods, and a contract with an employe upon the trains. In the former case the contract might tend to relax the vigilance of the company and of its employes; while in the latter, a stipulation which would place additional responsibility upon the employe, and require, for his own protection, a close observance of the rules of the company and a strict watch upon the conduct of his immediate superior, would tend to promote the safety of passengers and merchandise in transit.

Joshua R. Seney, for defendant in error.

It is well established that no agreement can be made between a company and a paying passenger that will exempt the company from liability to such passenger for the negligence of its employe. *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1; *Wells v. New York Central R. Co.*, 24 N. Y. 193; *Smith v. New York Central R. Co.*, 24 N. Y. 231.

So if a railroad company undertakes to convey a passenger without compensation, if the passenger is injured by the negligence of the company, it is liable in the absence of an express agreement exempting it. *Nolton v. Western*

Railroad Corporation, 15 N. Y. 444; *Philadelphia & Reading R. Co. v. Derby*, 14 How. (U. S.) 468; *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 340; *Wilton v. Middlesex R. Co.*, 107 Mass. 108; *Blair v. Erie Railway Co.*, 66 N. Y. 313.

But respectable courts have held that a railroad company may make a contract with a non-paying passenger, exempting itself from negligence. *Wells v. New York Cent. R. Co.*, 24 N. Y. 181; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; *Kinney v. Central R. Co.*, 34 N. J. 513; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 448. But see *Jacobus v. St. Paul & Chicago R. Co.*, 20 Minn. 125.

This question of public policy was considered in the following cases, but, like the case of *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, they arose on what is called drovers' passes. *Penn. R. Co. v. Henderson*, 51 Pa. St. 315; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Stevens*, 95 U. S. 660; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471; *Smith v. New York Cent. R. Co.*, 24 N. Y. 222.

Public policy does not change with the character of the train and with the character of the persons carried. If pecuniary liability for negligence promotes care in running a passenger train, the same liability will promote care in running a freight train. If such a contract with a passenger endangers the safety of other passengers, will not such a contract with an employe endanger the safety of other employes?

Judge Thompson, in his work on Negligence, and also in an article in the Central Law Journal, severely criticises the Georgia cases cited by counsel for plaintiff in error. 2 Thomp. Neg. 1025; 1 Cent. L. Jour. 485.

Such contracts with employes are void. *Roesner v. Hermann*, 8 Fed. Rep. 782; *Kan. Pac. R. Co. v. Peavey*, 29 Kan. 169.

Counsel for plaintiff in error seem to concede that a company can not contract with its employe against liability for its own negligence. It was held in *Cleveland, C. & C. R. Co. v. Keury*, 3 Ohio St 201, that the negligence of a conductor is the negligence of the company itself. That

Railway Co. v. Spangler.

decision has had the force and effect of positive law in this state for more than thirty years—it has been followed by many of the states of the Union—and it has received the approval of the highest tribunal of the land. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377. In the states where the conductor is regarded as the fellow servant of the brakeman, and not as the representative of the company, there is no need of a contract with the brakeman to exempt the company from liability for negligence of the conductor; and the only object of such a contract in this state is to do away with the force and effect of that decision. The court is, in effect, asked to hold that the settled law of Ohio, that a master is to be held responsible for the negligence of his superior servant in injuring the servant whom he has placed under his control, may be repealed by the contract of a railroad company.

OWEN, C. J. Is it competent for a railway company to stipulate with its brakemen, at the time, and as part of their contract of employment, that the company shall not be liable for the negligent acts of its conductors?

Western, etc., R. R. Co. v. Bishop, 50 Ga. 465, is cited, with other decisions of the same court approving and following it, in support of the affirmative of this proposition. In that case it was held that such a contract, so far as it does not waive any criminal neglect of the company, or its principal officers, is a legal contract and binding upon the employe. But McCay, J., speaking for the court, says: "We do not say that the employer and employe may make any contract; we simply insist that they stand on the same footing as other people. No man may contract contrary to law, or *contrary to public policy* or good morals, and this is just as true of merchants, lawyers, and doctors, of buyers and sellers, and bailors and bailees, as of employers and employes." This invites us to inquire whether and to what extent the contract we are dealing with is affected by considerations of public policy. It is maintained on behalf of the company that "a rule absolving the company from lia-

bility to the brakemen for negligence of the conductor, may operate to constitute the brakemen a sort of police; may induce them to be more watchful, and report to their superiors the delinquencies of the conductor. And if they are unwilling to do this, they, and not the company, should suffer the consequences. A rule of this kind is calculated, also, to better protect the public against injuries to merchandise in course of transportation, by promoting greater diligence and watchfulness on the part of the brakemen employed upon the trains."

Also that "a stipulation which would place additional responsibility upon the employe, and require for his own protection, a close observance of the rules of the company, and a strict watch upon the conduct of his immediate superior, would tend to promote the safety of passengers and merchandise in transit."

If this view is tenable, it follows that public policy is concerned in and subserved by such a contract as is here sought to be enforced. As brakeman on the train, Spangler was subject to the orders and control of the conductor.

In *Little Miami Railroad Co. v. Stevens*, 20 Ohio, 415, it was first held, though by a divided court, that a railroad company is liable to an employe for an injury received through the negligence of another employe under whose control he is placed.

This principle was again considered in *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 202, and was applied by a unanimous court to a case like the one at bar, and the railroad company was held liable to a brakeman for an injury resulting to him from the carelessness of a conductor under whose control he had been placed by the company.

In the course of an able and exhaustive opinion, Ranney, J., says: "The servants employed to execute can not recover for injuries arising from a failure in that part of the business committed to them, because it is their failure, and not that of their employer; and although it should happen from the negligence of but one of them, yet each one entered the common service with a knowledge that others

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must be engaged, and they were jointly bound to perform what was jointly intrusted to them, and public policy may be concerned in their keeping a supervision over each other for the purpose. But how this can be made to extend to the conductor, over whose acts they have no supervision or control, and are not presumed to be possessed of the requisite intelligence for the purpose, we are wholly unable to see; and equally so, how the safety of travelers is likely to be jeopardized by adding to the responsibility of the conductor for his carelessness, that of the company that places him in power. . . . It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. . . . But they can not be made to bear losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences."

A careful examination of this case and of *Little Miami R. Co. v. Stevens*, *supra*, which it approves and follows, will make it apparent that the liability of railroad companies for injuries to their servants caused by the carelessness of those who are superior in authority and control over them, is placed chiefly upon considerations of public policy.

The doctrine established by these cases has remained unquestioned by this court for more than thirty years. It furnishes a conclusive answer to the contention of the company that the stipulation which it seeks to enforce would better protect the public by promoting greater diligence on the part of brakemen and the consequent safety of passengers and merchandise in transit.

We are thus relieved of all discussion of the relation which the liability of railroad companies for injuries to their servants caused by the negligence of their superiors in authority sustains to the policy of the state. It is the firmly established policy of our law that such liability

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should attach. It follows that even *Western, etc., R. R. Co. v. Bishop, supra*, which is the strongest authority cited by the company in support of its position, fails to support the view contended for. As we have seen, that case expressly declares that contracts contravening public policy will not be enforced. The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employes, stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employes simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements. The trial court was right in refusing the instruction requested.

Judgment affirmed.

44s	479
44s	484
44s	485
44	479
53	463

CITY OF COLUMBUS v. SOHL.

Municipal corporations—Assessments—Estoppel by petitioning for improvement—Agency.

An assessment made by the city of Columbus upon the property of an owner abutting upon North High street, who petitioned for the improvement, under the act of March 30, 1875 (and which was held to be unconstitutional in *State ex rel. v. Mitchell*, 31 Ohio St. 592), is not invalid, although it appears that some of the names, representing owners whose frontage was necessary to constitute the two-thirds of the frontage upon the street, required by the act as authority for ordering the improvement, were signed to the petition, not by themselves, but by persons assuming to act for them, where it further appears that there was no fraud in the matter, and that the agency was subsequently ratified by each owner, before the city directed the work to be done and issued its bonds for the cost of the improvement, and this is so where, under like circumstances, the agent signed his own name for that of the principal.

ERROR to the Circuit Court of Franklin county.

This case is one of a class that was before this court in *Tone v. Columbus*, 39 Ohio St. 281. It was brought to enjoin the collection of an assessment that had been made upon certain property of Sohl fronting upon North High street, Columbus, the assessment having been made for the improvement of the street under the provisions of an act passed March 30, 1875 (72 Ohio L. 153). This act was held invalid in *The State ex rel. v. Mitchell*, 31 Ohio St. 592, but notwithstanding its invalidity, the court then also held, that when the abutting lot-owners had caused a street to be improved under the act, and the bonds of the city to be negotiated to pay for the improvement, all who had participated in causing the improvement to be made were estopped from denying the validity of an assessment, made in accordance with the act, to pay such bonds.

After the decision in the *Tone case*, issues were made up in the courts below, upon which it, with others, including the present one, was referred to a master with directions to take the evidence and report his conclusions of law and fact separately to the court. Upon the issues as made, the principal question was as to whether two-thirds of the owners of the frontage upon the street had petitioned the council of the city for the benefits of the act before the passage of the ordinance ordering the improvement to be made, and the issuing of the bonds of the city in payment of the same; and this turned upon the further question, as to whether an agent could act for an owner in petitioning for the improvement; and if so, whether in such case the petition could be signed by the agent without indicating his agency on the petition; and also, whether a subsequent ratification by an owner should be held as equivalent to a previous authority, when done before the improvement was ordered and the issuing of the bonds of the city. In all such cases the master held, upon the facts reported by him, and about which there is no dispute, that the owners should be counted as petitioners, and that, including owners who had so signed by agent, the requisite ownership of the frontage upon the street had been obtained to warrant

the assessment made on the property of the defendant in error for the cost of the improvement. The circuit court reversed the conclusions of the master in this regard and rendered judgment for the defendant in error.

This proceeding is prosecuted to reverse the judgment of the circuit court and for judgment upon the facts as found for the plaintiff in error.

James Caren, city solicitor, *C. T. Clark*, and *Jones & Jones*, for plaintiff in error.

R. P. Woodruff, *L. & W. H. English*, and *J. Wm. Baldwin*, for defendant in error.

BY THE COURT. We think the judgment of the circuit court in this case should be reversed and judgment rendered in favor of the city. The defendant in error, Sohl, petitioned for the benefits of the act, the making of the improvement under its provisions, and thereby, with the others acting with him, induced the city to negotiate its bonds to pay for the improvement. The general principles of estoppel were applied to this aspect of the case, in *State ex rel. v. Mitchell*, 31 Ohio St. 592.

But it is claimed that two-thirds of the ownership of the frontage upon the street had not been obtained prior to the passage of the ordinance authorizing the improvement to be made, and that, therefore, the defendant is not liable.

This claim is based upon the decision in *Tone v. Columbus*, 39 Ohio St. 281. The master found upon the testimony taken before him that the requisite two-thirds of the frontage had been obtained. The facts as to each contested petitioner, and the amount of his frontage, were found and reported by him, so that it is not necessary to review the evidence as to the question whether the requisite ownership of the frontage had been obtained or not, so far as it is confined to the facts so found and reported by the master, and not modified by the court. For it will be found, upon analysis, that the modifications made by the court, in

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the findings of the master, were in his conclusions of law and not in his findings of fact as to each contested petitioner. It was found that in a number of cases the petition had been signed, not by the owner, but by some one for him as agent, and in some cases the name of the agent only was signed to the petition. But in all these cases, where the master found the owner to have been a petitioner, he also found, as a fact, either that the agent was authorized to act for the owner as principal, or that the owner subsequently ratified the act before the improvement was ordered and the city negotiated its bonds. We see no good reason why, in this case, an owner may not have acted by his agent as well as by himself. It was not a question of jurisdiction. The law was invalid, and no authority was derived from it, for the making of the improvement, beyond the extent to which it had been adopted by all concerned as a scheme for improving North High street. Its provisions simply furnished the terms of an agreement among the concurring property holders, and the basis of a commission from them to the agencies of the city for the improvement of the street; and the rights and liabilities of all parties, including the city, are to be determined by the law of contract and agency, and not by any statutory powers that may have been intended to be conferred by the legislature; for the act being invalid could confer none. So that it is not material in this view of the case whether two-thirds of the frontage had been obtained before or after the passage of the ordinance, so that it was obtained without fraud or imposition upon the property owners before the work was directed to be done for which the city issued its bonds.

We do not regard this as conflicting with any thing held and determined in the *Tone* case. It was presented upon a demurrer to the petition, that charged fraud and bad faith upon the part of the city and many of the petitioners, and averred that, as a matter of fact, two-thirds of the ownership of the frontage upon the street had not been obtained; and upon these facts the court held the plaintiff entitled to

relief and that the demurrer should be overruled. This is entirely consistent with what we have said. The power to direct the improvement to be made and to make an assessment being referred to a voluntary agency, conferred by the property owners upon the city, must derive its validity from what is done in the execution of the agency, and not from any supposed jurisdiction conferred on the city by the statute in question, that could only have attached to a given state of facts, required to exist at the time the so-called ordinance was passed, and could not have been helped by any subsequent facts, prior to the order for the improvement of the street and the issuing of its bonds by the city.

All the charges of fraud and bad faith on the part of the city, or of any of the petitioners, are negatived by the findings of the master, and the findings in this regard of the master are adopted by the court as part of its findings of fact. And from what has been said, it appears, as we think, that the master was clearly right in concluding from the facts found by him, and not modified by the court, that an excess of two-thirds of the ownership of the frontage had petitioned for the improvement before it was ordered to be made.

The judgment of the circuit court is reversed at the costs of the defendant in error, and judgment is rendered for the city dismissing the action of the plaintiff below at his costs.

City of Columbus v. Slyh.

CITY OF COLUMBUS v. SLYH.

Municipal corporations—Assessments—Estoppel by participating in election of improvement commissioners.

ERROR to the Circuit Court of Franklin county.

James Caren, city solicitor, *C. T. Clark* and *Jones & Jones*, for plaintiffs in error.

David Stalter, for defendant in error.

BY THE COURT. This also was a suit brought by the defendant in error to restrain the collection of an assessment made upon his property for the improvement of North High street, Columbus, under the act of March 30, 1875. (See *City of Columbus v. Sohl*, ante p. 480.) The defendant in error purchased the property of one, Trip, who did not petition for the improvement, but is found to have participated in the election of the commissioners, and afterward united with a number of others in a remonstrance against the improvement made to the council on August 9, 1875. We perceive no essential difference between petitioning for the improvement and participating in the election of commissioners to carry the plan into execution. If commissioners had not been selected the scheme would have failed; so that those who participated in the election of commissioners promoted the improvement under the law as much as those who petitioned for it in the first instance.

Nor do we see how the subsequent remonstrance of Trip against the improvement should relieve him from the liability incurred by participating in the election of commissioners. Upon their selection, as provided in the act, the supervision and construction of the improvement devolved upon the commissioners; and we fail to find in the statute any provision by which the city or its council could, after that, have arrested the doing of the work. The agency of the

City of Columbus v. Agler.

city ended with authorizing the election of commissioners and the selection of officers for holding the election. Afterward it became the duty of its engineer to furnish proper grades and lines and of its mayor to issue bonds as the commissioners might require to meet the expense of the improvement. These duties were of a passive nature, and gave to the city itself no more control over the prosecution of the work than was possessed by any one of its citizens. So that the remonstrance of the defendant to the city council against the improvement, after the election of the commissioners, was of no more avail to him than if it had been made to some third person.

The case is distinguished from *Hays v. Jones*, 27 Ohio St. 218. There one of the land-owners who had petitioned for the improvement, with others, signed a remonstrance before the petition had been acted on by the commissioners of the county; and this the court held he could do; not that he could do so after the order for the improvement had been made.

As Slyh stands in the shoes of his grantor, Trip, the judgment as to him must be reversed and judgment rendered for the defendants below.

CITY OF COLUMBUS v. AGLER.

Municipal corporations—Assessments.

ERROR to the Circuit Court of Franklin county.

This case also arose out of the improvement of North High strSet, Columbus, under the invalid act of March 30, 1875 (72 Ohio L. 153). The facts distinguishing it from the case of *City of Columbus v. Sohl*, ante, p. 480, are stated in the opinion.

44	485
61	488
44	485
67	180

City of Columbus v. Agler.

James Caren, city solicitor, *Jones & Jones*, and *C. T. Clark*, for plaintiff in error.

L. English, for defendant in error.

BY THE COURT. The finding of the court in this case is that Mary J. Agler was not a petitioner, and that she remained silent until the improvement was made and the bonds of the city for the payment of the same had been negotiated; yet that she had knowledge that the improvement was being made at the time thereof. It is also found that her property was benefited by the improvement to the extent of four dollars per front foot, and no more. We think the judgment in this case should be affirmed. The act under which the proceedings for the improvement were had was invalid, as held in *State ex rel. v. Mitchell*, 31 Ohio St. 592, and she was in no way a promoter of the same. There is nothing in her case to distinguish it from the decision in *Wright, Treas., v. Thomas*, 26 Ohio St. 346. Neither the city, in causing the work to be done, nor the contractor in doing it, were trespassers as to her, although the proceedings were invalid. The title to the street was in the city, and not in her. Its improvement was no injury to her, and she could not prevent it by any proceeding she could adopt, as she might have done had it been an improvement upon her own land. She was not called on to do any thing until steps were taken to make the assessment upon her property. This distinguishes the case from *Kellogg v Ely*, 15 Ohio St. 64, and similar cases.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO.
JANUARY TERM, 1886.

HON. SELWYN N. OWEN,	CHIEF JUSTICE.
HON. MARTIN D. FOLLETT,	} Judges.
HON. FRANKLIN J. DICKMAN,	
HON. WILLIAM T. SPEAR,	
HON. THAD. A. MINSHALL,	

PATTERSON v. LAMSON.

Trial—Findings of fact—Section 455, Revised Statutes, construed.

The finding of facts required on the reservation of a cause by section 455 of the Revised Statutes, as amended April 18, 1883 (80 Ohio L. 169), is a positive finding in which a final judgment may be rendered, and not a provisional one.

RESERVED in the District Court of Cuyahoga county.

T. E. Burton, for plaintiff in error.

Caskey & Calhoun, for defendant in error.

BY THE COURT. The suit below was brought by the plaintiff to quiet title to a piece of land, and was appealed to the district court of the county.

The second defense of the answer set up new matter,

(487)

to which the plaintiff demurred, and the court, on motion of the defendants, reserved the cause for decision in this court; and, "for the purpose of the hearing upon demurrer only," found all the allegations of the second defense to be true, and stated the questions of law arising thereon. It is also stated in the finding that "no testimony was offered upon the hearing of the cause" by either side as to the averments of the second defense; and that "the plaintiff asks that, in case said demurrer be overruled, his right to file a reply to said second defense, and to contest the averments thereof by testimony, be reserved to him."

Held, that this is not such a finding as was recognized by the statute then in force, section 455 Revised Statutes, as amended April 18, 1883 (80 Ohio L. 169); that it required a positive, and not a provisional, finding of facts, upon which a final judgment might be rendered. The finding as made being a provisional one, the questions arising thereon may or may not be material to a determination of the case. The plaintiff may, by his reply, *controvert* some or all of the material allegations of the defense, and it may fail for want of proof upon the trial, so that a determination of the questions of law arising upon its averments would be a fruitless one, so far as the litigation between the parties is concerned.

The cause is therefore stricken from the docket of this court, and the papers ordered to be returned to the circuit court of the county, to be there proceeded in as if no order of reservation had been made, and the cause had continued upon the docket of the district court, and its successor, the circuit court, of the county.

THE STATE *ex rel.* GRAHAM v. HOLMES, AUDITOR.

*Publication of exhibit of receipts and expenditures of county officers—
Section 852, Revised Statutes, construed.*

ERROR to the District Court of Tuscarawas county.

Mandamus to compel auditor to issue warrant on treasurer.

T. D. Helea and James Patrick, Jr., & Son, for plaintiff in error.

H. T. Stockwell, for defendant in error.

BY THE COURT. In compliance with section 852, Revised Statutes, the county commissioners of Tuscarawas county, at their regular session in September, A. D. 1882, examined and compared the accounts and vouchers of the auditor and treasurer of the county, counted the funds in the treasury, and assumed to direct Abraham R. Holmes, the auditor, to publish an exhibit of the receipts and expenditures for the year then past, in certain newspapers, and among them in the "Tuscarawas Chronicle," a newspaper of which the relator, James E. Graham, then was the owner and publisher. The auditor, although thus directed, did not at any time, or in any manner, contract with, request, or authorize the relator to publish said exhibit in his newspaper, but caused such publication to be made in two other newspapers of opposite politics, and also in one German newspaper, that were printed and of general circulation in Tuscarawas county.

The relator published said exhibit in the "Tuscarawas Chronicle," and his claim for so publishing was allowed by the county commissioners, and for the payment thereof, they ordered the auditor to issue a warrant, in behalf of the relator, on the treasurer of the county. Upon the auditor's refusal to comply with the order, a proceeding in mandamus was commenced to compel him so to do. To the peti-

 Castle v. Rickly.

tion for mandamus an answer was filed by the auditor; a demurrer to the answer was overruled by the court of common pleas, and such ruling was sustained by the district court.

Held, that the law conferred upon the auditor, and not upon the county commissioners, the power and authority to select the newspapers in which said exhibit may be published.

Judgment affirmed.

 CASTLE v. RICKLY.

Promissory notes—Signature of stranger on back of note—Guaranty.

A promissory note payable to M., or order, was delivered to the payee, who indorsed it in blank, and offered it to R. in part payment for property purchased. R. declined to take it without the signature thereon of C., a stranger to the note. C. thereupon, before the maturity of the note, and to give it credit, signed his name under the indorsement of the payee, and the note was then taken by R. *Held*, that C. was an unconditional guarantor, and that the owner and holder of the note has a *prima facie* right of recovery against him, without proof of demand and notice.

ERROR to the District Court of Franklin county.

J. T. Holmes, for plaintiff in error.

Castle was not a "stranger" to the paper in the ordinary sense of the term or within the definitions of a stranger to negotiable instruments.

He is in the chain of title; a regular indorser after the payee; a party to the paper.

If Matheny had not written a waiver over his name which was, possibly, sufficient to waive demand and notice, he would, unquestionably, have been entitled to demand and notice.

If Rickly had indorsed and transferred before due, *he* would have been discharged without demand and notice.

44	490
46	500
44	490
55	606
55	610

Castle v. Rickly.

Castle indorsed after Matheny, the payee, in point of order and of time, and both indorsements were after the paper was regularly launched upon the commercial world. 2 Dan. Neg. Inst., sec. 1757.

Castle appears on the paper and by the evidence as the link in the chain of title between Matheny and Rickly—a pure indorser—without a syllable of evidence to vary the contract liability, on his part, of an indorser. 1 Dan. Neg. Inst., secs. 707-707b.

Two things are established: 1. That Castle waived nothing, either when he indorsed the paper or afterward. 2. That his agreement to pay was conditional only.

If the plaintiff in error was not entitled to notice of demand and non-payment of the paper in question, then demand and non-payment, and notice thereof, are not necessary to fix the liability on commercial paper of any indorser after the payee, because, upon the theory of the other side, they are all “absolute, unconditional guarantors.” This is certainly overturning well-settled rules.

See, as bearing upon the subject, *Champion v. Griffith*, 18 Ohio, 228; *Clay v. Edgerton*, 19 Ohio St. 549; *Greene v. Dodge*, 2 Ohio, 431; *Parker v. Riddle*, 11 Ohio, 102; *Robinson v. Abell*, 17 Ohio, 36; *Greenough v. Smead*, 3 Ohio St. 416.

E. L. De Witt, for defendants in error.

The averments of the petition made Castle, at least, *prima facie*, a guarantor. “The mere indorsement upon a note of a stranger’s name in blank is *prima facie* evidence of guaranty.” *Champion v. Griffith*, 18 Ohio, 228; *Robinson v. Abell*, 17 Ohio, 43; *Greenough v. Smead*, 3 Ohio St. 415, 418; 2 Par. N. & B. 120, n. e, 124, n. p.

There is nothing in either the answer of the defendant, Castle, or in the evidence, to negative the claim that Castle was a guarantor.

Rickey was not required to give Castle notice of demand and non-payment. *Clay v. Edgerton*, 19 Ohio St. 549.

Castle was a stranger to the paper. He indorsed it in

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blank long after its execution. *Prima facie* he was a guarantor. There were no conditions attached to his guaranty. It is impossible to make a guaranty more unconditional than when no conditions whatever are attached. It was certainly as absolute and unconditional as if he had written over his name the words, "I guarantee the payment of the within note."

The court of common pleas erred in its charge as to the necessity of notice of demand and non-payment. The liability of an indorser is conditional upon receiving prompt notice of demand and non-payment. This is not so as to a guarantor. While a *conditional* guarantor may be entitled to notice within a reasonable time, yet for want of such notice he is only discharged to the extent of the loss he may have suffered; and he must set it up as a defense. *Bashford v. Shaw*, 4 Ohio St. 262, 268. "Delay to give the notice affords the guarantor no defense, if in fact he could not have been injured by the delay." *Wolfe v. Brown*, 5 Ohio St. 304, 306; *Forest v. Stewart*, 14 Ohio St. 249; 2 Dan. Neg. Inst., sec. 1754; *Perry v. Barrett*, 18 Mo. 140.

In *Greene v. Dodge*, 2 Ohio, 431, the court held the guaranty to be "in its very nature conditional." This distinguishes the case from *Clay v. Edgerton*.

Parker v. Riddle, 11 Ohio, 102, is, in effect, so far as this case is concerned, overruled by *Clay v. Edgerton*.

Robinson v. Abell, 17 Ohio, 36, turned upon the liability of an indorser as maker.

I am unable to see that *Greenough v. Smead*, 3 Ohio St. 416, has any bearing upon this case.

DICKMAN, J. On the 18th day of November, 1872, George W. Griffith, for value received, made his two promissory notes of that date, for \$156 each, to Jacob Matheny or order, payable respectively in three and four years after date, with interest from date, payable annually. Both notes bore the indorsement: "Protest waived. J. S. Matheny, G. F. Castle." Matheny, and Castle, the plaintiff in error,

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purchased a house and lot in Columbus, Ohio, of Samuel S. Rickly, one of the defendants in error, and these notes were transferred to him as part of the purchase-money. Upon non-payment of the notes by the maker at maturity, an action was brought by Rickly on each note against Griffith, Matheny, and Castle, in the court of common pleas for Franklin county, but the two cases were consolidated, and Griffith and Matheny being in default for demurrer or answer, the case as consolidated was tried on the issues made by an amended petition and the answer of Castle thereto. The notes were taken by Rickly several days after they were executed and delivered to the payee, to wit, about December 10, 1872. Although the payee had indorsed them, Rickly before taking them, required, for additional security, that Castle should also put his name on the back thereof. Castle accordingly, and before the notes had matured, signed his name thereon under that of the payee; the notes were then delivered to Rickly, and the real estate transaction was consummated. On the trial in the common pleas, evidence was offered by the defendant tending to show that the words "protest waived" were put on the notes by Matheny, some considerable time after their delivery to Rickly as part payment for the real estate, and that Castle had no knowledge thereof until after the original action was brought.

Among other things, the court charged the jury as follows:

1st. "The instruments sued on in this action are not foreign notes, but are inland notes, . . . but it was necessary, at maturity, to demand payment of the maker, and on his failure to promptly pay the same, to give immediate notice of such demand and dishonor to the indorsers, unless demand and notice of such non-payment had been waived."

2d. "But, whether he" (the defendant, Castle) "was indorser or guarantor, the nature of his undertaking was such that he was entitled to have notice of demand and

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non-payment of said notes, the same as if he was a mere indorser; and if no such notice was given to him, the plaintiff can not recover, unless you should find, from the evidence, that the words 'protest waived' were on said notes at the time the said Castle indorsed them, or that they were subsequently placed there by his authority."

But the court refused to give the following in charge to the jury, as requested by the plaintiff, to wit:

"If you should find, from the evidence, that the said Castle did not indorse said notes, by writing his name on the back thereof, under the words 'protest waived,' or at the same time, and as part of the same transaction, he did not write, or there was not written over his name the words 'protest waived;'. yet, if you should find, from the evidence, that the said Castle indorsed said notes, by writing his name upon the back thereof, in blank, after the execution of said notes, and that the said Castle was not an original party to the notes, but a stranger, this would constitute an absolute and unconditional guaranty of said notes by the said Castle; and the said Castle, having made no defense to said guaranty, he would be liable, as guarantor of said notes, without notice to him of demand and non-payment, or protest, and your verdict must then be for the plaintiff, finding the amount due the plaintiff from said defendant, Castle, on said notes."

To which charge and refusal to charge the plaintiff at the time excepted. A verdict was returned in favor of Castle. A motion for a new trial being overruled, judgment was entered on the verdict, and a bill of exceptions, embodying all the evidence adduced on the trial, was allowed and made part of the record. The district court reversed the judgment of the common pleas, for error in its charge, and refusal to charge the jury as requested, and remanded the cause for a new trial. This proceeding is instituted to reverse the judgment of the district court.

It is not claimed that the plaintiff in error ever had notice of any demand of payment on the maker of the

paper in question and of its dishonor. The jury was doubtless satisfied that Castle had not expressly waived demand and notice; that he had not adopted the words of waiver put on the note by Matheny. From the charge of the court and its refusal to charge as requested, the jury could not but find that Castle had the rights of an indorser, and was entitled to have notice of demand and non-payment of the notes, and that the plaintiff upon his failure to give such notice could not recover. The question therefore arises, whether Castle is to be regarded as an indorser of negotiable paper, with the liabilities and rights incident to such an engagement, or a guarantor, whose guaranty was of such nature as to render it unnecessary to prove either demand or notice in order to make out a *prima facie* case for recovery.

We are of opinion that the plaintiff in error was such a guarantor. It was held in *Champion v. Griffith*, 13 Ohio, 228, and afterward approved in *Robinson v. Abell*, 17 Ohio, 36, that the mere indorsement upon a note of a stranger's name in blank is *prima facie* evidence of guaranty—there being no proof that his indorsement was made at the time of the making of the note. This presumption, it is true, may be overcome by parol evidence that a different agreement was intended. *Oldham v. Broom*, 28 Ohio St. 52; *Kelley v. Few*, 18 Ohio, 441; *Bright v. Carpenter*, 9 Ohio, 139; *Champion v. Griffith*, *supra*; *Robinson v. Abell*, *supra*. But the evidence, as disclosed by the record, shows that Castle's name was not put upon the notes at the time of their execution or before they were drawn, and so he could not be charged as an original promisor. He was a stranger to the paper—his name not being thereon—at the time it was first offered to Rickly in part payment for the real estate. Not then being in the chain of title, having no ownership in the notes, he could not, in the capacity of indorser, vest title thereto in an indorsee. Matheny, the payee, was at the time in possession of and the sole owner of the notes, and was the only person competent as an indorser to enter into the contract implied in the act of indorsement, namely,

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that he had a good title to the instruments. As an indorser, he did not transfer the paper to Castle, who might in turn indorse it to pass title, but Matheny by indorsement vested title directly in Rickly, with no indorsee intervening. Rickly, however, demanded other security than a recourse to those who were parties to the paper, and therefore required that Castle, a stranger to the paper, should place his name upon its back, and thus add strength and credit to it, and render it more easy of circulation. Castle, in signing his name under that of the payee and indorser, assumed the obligation of a guarantor, and did not contract to pay the notes if dishonored, only upon condition that they would be duly presented for payment at maturity, and due notice would be given to him of the dishonor. The rule as laid down by Judge Story is, that if subsequently to the time when the note is made a party indorses it, not being a regular indorsee from or under any of the antecedent parties, he will be deemed a guarantor, if there be a sufficient consideration. Story on Prom. Notes, sec. 133.

The guaranty of the plaintiff in error was not dependent on any condition or contingency expressed in or implied from the terms of his contract. In legal effect, it was as absolute and unconditional as if he had written on the back of each note, "I guarantee the payment of the within note"—words held in *Clay v. Edgerton*, 19 Ohio St. 549, to be an absolute and unconditional guaranty, and which rendered it unnecessary to aver or prove either demand or notice, in order to make out a *prima facie* case for recovery. As said in *Neil v. Trustees, etc.*, 31 Ohio St. 15, "a breach of the agreement of the guarantor results from the non-payment of the debt." There being no condition, as regards presentment or notice, implied in the terms of such a guaranty, the guarantor must inquire of his principal, or take notice of his default, at his peril. By such guaranty, the guarantor is not made a party to the note, and his contract, unlike that of an indorser, is governed by the rules of the common law, and not by those peculiar to the law

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merchant. "It is an undertaking to do a certain thing in a certain specific event. The event is a default in the payment of the bill or note by the parties. When this happens, the liability of the guarantor, by the terms of his guaranty, is complete." Story on Prom. Notes (7th ed.) 623, note by Thorndike. In accordance with the foregoing considerations, we are of opinion that the judgment of the district court should be affirmed.

Judgment accordingly.

SPOORS v. COEN.

Fraudulent conveyance—Sale of lands to pay debts of deceased grantor—Jurisdiction of probate court—Sections 6139 and 6140 of the Revised Statutes—Void judgment—Collateral impeachment.

1. Lands that have been conveyed to defraud creditors, and that, by section 6139 of the Revised Statutes, are made assets for the payment of the debts of the deceased grantor, can not be ordered sold for such purpose, until the conveyance has been set aside, in a proceeding commenced for that purpose in the court of common pleas, no such jurisdiction having been conferred upon the probate court.
2. When lands have been so conveyed, the possession of the lands after the death of the grantor, by his administrator, avails nothing in a proceeding begun in the probate court for their sale to pay debts, unless such possession had been acquired by a reconveyance from the fraudulent grantee, or those claiming under him, or in an action instituted for that purpose in the court of common pleas, as provided in section 6140 of the Revised Statutes.
3. An order made by the probate court for the sale of such lands, upon a judgment of its own, setting aside the conveyance as null and void, is of no validity whatever, and may be impeached in a collateral proceeding to recover the land.
4. The judgment of a court upon a subject of litigation within its jurisdiction, but not brought before it by any statement or claim of the parties, is null and void, and may be collaterally impeached.

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The action below was a suit by the plaintiff, Rhoda Spoors, against the defendant to recover the possession of a certain tract of land, some two acres and a fraction, described in the petition. She derived title from her husband, John Spoors, who, on the 4th of March, 1879, conveyed all his real estate to his son, Jerome, who, on the same day with his wife, conveyed the land in question to the plaintiff.

John Spoors having died, a petition was filed September 26, 1879, in the probate court of the county to sell lands to pay debts; and, under an order of sale made therein, the lands sought to be recovered were sold to the defendant, and a deed made by the administrator on August 9, 1880.

The court of common pleas rendered judgment in favor of the defendant, and the plaintiff prosecuted proceedings in error in the district court, where the cause was reserved for decision in this court, upon the question, whether the defendant, Coen, acquired a title to the lands, claimed by the plaintiff, under the proceedings had in the probate court, and the deed made by the administrator in pursuance thereof.

The proceedings are set forth in a bill of exceptions taken at the trial in the common pleas, and the only controversy is as to the jurisdiction of the court to order the sale of the lands.

The petition of the administrator set forth the indebtedness of the estate and the amount of the personal property; that it was insufficient to pay the debts, and that a short time previous to his death, and up to the 4th of March, 1879, the decedent was the owner of certain real estate situate in the county, describing it, and then averred "that on the 4th day of March, A. D. 1879, the said John Spoors, decedent, being then very aged and infirm and feeble in body and mind, and being deeply involved in debt, did by his deed of that date, convey to the defendant, Jerome Spoors, all the above described real estate; that the consideration expressed in said deed of conveyance for and of said real estate was six thousand (\$6,000)

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dollars; that the defendant, Rhoda Spoors, then the wife and now the widow of decedent, joined in said deed of conveyance; . . . that said conveyance of said land by said decedent to said defendant, Jerome Spoors, was in fact made without any other or further consideration than the promise of said defendant, Jerome Spoors (who is the son of said decedent); that he would pay the debts of said decedent, and that he would keep and maintain the said decedent and his wife (now his widow) during their natural lives; that the promise of said Jerome Spoors to pay the debts of said decedent, and to keep and maintain said decedent and his wife (now his widow) during their said lives, was the whole consideration for said land paid and to be paid by said grantee, Jerome Spoors, to said decedent; that said Jerome Spoors has not paid the debts of said decedent, nor any part thereof, nor did the said Jerome Spoors keep and maintain said John Spoors, decedent, and his wife during the life-time of said decedent, nor has he kept and maintained said Rhoda Spoors, widow of said decedent, since the death of said decedent, nor does he now keep and maintain her; . . . that the petitioner has been and is now in the exclusive possession of said premises, herein described, since the death of said John Spoors, and the appointment of the petitioner as administrator of said estate; that said decedent died leaving Rhoda Spoors, his widow, who is entitled to dower in said premises, and the following named persons his heirs at law having the next estate of inheritance in said premises as follows:” naming them.

The only prayer for relief against the widow was, “that the dower of the said Rhoda Spoors may be set off and assigned to her.”

It also contained a prayer for an order to sell the land, being something over a hundred acres, for the purpose of the proceeding.

An appearance was entered, and an answer filed for the widow by the attorney, who acted for the administrator, in these words:

“And now comes Rhoda Spoors, and in answer to the

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petition of the plaintiff herein, says that she desires to inform the court that she waives the assignment by the court to her of her dower estate in the land of her late husband, John Spoors, and elects to take her dower in said estate in money, and prays the court to protect her interest in said estate."

On December 9, 1879, the cause came on for hearing, and Jerome Spoors admitting the averments as to himself to be true, the court found that it was necessary to sell the lands to pay the debts of the estate, and "that the deed from the decedent to the said Jerome Spoors is null and void, and passed no title to said Jerome Spoors in said lands described therein and in the petition herein," and further found "that the conveyance by defendant, Jerome Spoors, to the widow, Rhoda Spoors, of two acres of land, being part of the lands of said decedent not included in the 100 acres hereinbefore described, is null and void, and said Rhoda Spoors did not take any title to said two acres thereby," and ordered the land to be appraised and sold "free from the dower estate of said widow Spoors therein."

The petition contains no allusion to any conveyance having been made to the widow of a part of the land, and no relief was asked as to her, other than as before stated. The land was appraised and sold by the administrator, under the order, to Coen; the sale was confirmed by the court, and a deed made to Coen.

John W. Canary, for plaintiff in error.

Cook & Troup, for defendant in error, Coen.

MINSHALL, J. There are, as we think, two sufficient reasons for holding that, upon the case as reserved to this court, judgment should be rendered for the plaintiff. 1. The probate court is not clothed with the jurisdiction it assumed to exercise in setting aside the conveyance to Rhoda Spoors. 2. But if it were, no such jurisdiction had been invoked by the administrator in his petition as against her.

1. The probate court had no jurisdiction, for, although it is provided in section 6139, Revised Statutes, that the petition to sell lands to pay the debts of the estate "shall include all the deceased may have conveyed with intent to defraud creditors," yet it is provided in section 6140, Revised Statutes, that "where such land is included in the application before a recovery of the possession thereof, the action shall be in the court of common pleas."

The reason of this provision doubtless arose from a persuasion in the minds of the legislature that a recovery of such lands involved an exercise of jurisdiction that should only be conferred on the court of common pleas, they being courts of general jurisdiction in matters of law and equity, and therefore more competent, from the character of their judges, constantly employed in the exercise of such jurisdiction, to hear and determine such matters. And so, to avoid a multiplicity of suits, it is provided that an action to set aside a conveyance of lands, that had been made by a decedent to defraud creditors, may be united with a proceeding for an order of sale to pay debts, by resorting, in the first instance, to the court of common pleas.

In this case the pleader seems to have assumed that he had avoided this objection to the jurisdiction of the court, by the averment, "that the petitioner has been and is now in the exclusive possession of said premises." But mere possession, however exclusive, by the administrator, does not confer jurisdiction upon the probate court to order a sale to pay debts, unless the possession had been recovered in an action against the grantee, or those claiming under him, for the purpose of having the conveyance set aside as fraudulent against creditors. Until the conveyance has been set aside by the judgment of a competent court, or a reconveyance made by the party holding the title, an order for the sale of such lands to pay the debts of the decedent can not be made in the common please or probate court. This is in harmony with what has been the settled policy of our state in the matter of judicial sales, which has always been to so offer the land as to transfer it to the pur-

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chaser with a good title, that an advantageous sale may be made, instead of offering it as a lawsuit for what can be obtained from those who may feel disposed to invest in litigation. Hence, possession not acquired as the fruits of a judgment in a suit to recover the land, avails nothing, where the proceeding for an order of sale is begun in the probate court, instead of the common pleas.

2. But, had the probate court the same jurisdiction in such matters as the common pleas, it would avail nothing in this case, for the reason that no such jurisdiction was invoked by the petition of the administrator as against Rhoda Spoors. There is no averment in the petition that any land had been fraudulently conveyed, mediately or immediately, to her. The only averment as to her is, that she is entitled to dower in the lands, for which an order of sale is asked; and the only relief asked as to her is that her dower may be set off and assigned therein. And, in the answer filed for her by the attorney of the administrator, she simply waives an assignment of dower in the lands and elects to take the same in money.

It is by no means intended to question or impair the principle that when jurisdiction has been obtained over the subject-matter of a cause, by a court competent to exercise it, its judgment, however erroneous, can not be questioned in a collateral proceeding. A judgment so rendered can only be set aside or questioned in a direct proceeding instituted for that purpose. This is familiar law. Freeman on Judg., § 135.

But a judgment rendered by a court of competent jurisdiction in a case brought before it, however erroneously the jurisdiction may have been exercised, is one thing, and a judgment entered by a court of like jurisdiction in a case not before it, is another and a different thing. In the one case its judgment may be erroneous, in the other it is void. To bring a cause before a court, competent to adjudicate it, it is not only necessary that the parties should be *in jus vocatio*, cited or summoned in the manner required by the law of procedure, but a case must also be made, or stated,

affecting the party against whom relief is asked. The power to hear and determine a cause is defined to be jurisdiction. Freeman on Judg., § 118. And, to use the language of Ranney, J., in *Sheldon v. Newton*, 3 Ohio St. 494, "it is *coram judice* whenever a case is presented that brings this power into action." "But," he adds, "before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; *that such complaint has actually been preferred*; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained." The italics are our own, to call attention to the clause applicable to the question in the case before us.

It is not necessary that the statement of the claim should be so perfect in form and substance, as to be free from objection on demurrer, to confer jurisdiction upon the court to hear and determine it. *Buchanan v. Roy*, 2 Ohio St. 251. If the case presented invoked the jurisdiction of the court, and could have been perfected by amendment, the judgment of the court thereon could not be treated as a nullity. But, in order that a party may be permitted to amend, there must be something to amend by. *Shamokin Bank v. Street*, 16 Ohio St. 10. So, unless a case is presented that could be amended, there is no case upon which a judgment can be rendered. A judgment rendered where no case has been stated is as much a judgment upon a case *coram non judice*, whatever may be the jurisdiction of the court rendering it, as a judgment upon a case, however perfectly stated, before a court not clothed with jurisdiction to hear and determine it.

If there were a note secured by mortgage, and suit were brought upon the note for a money judgment only, it would hardly be claimed that a judgment of foreclosure would be of any validity, even as against the mortgagor. And yet the case presented in this record is not distinguishable in principle from the case just supposed.

In *Strobe v. Downer*, 13 Wis. 11, Downer had purchased

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lands at a sale made in a foreclosure proceeding, on which Strobe, by assignment from one Weimer, held a prior mortgage. The bill contained an averment that Weimer had, or claimed, some interest in the property, and he was made a party, but he did not answer. The judgment in foreclosure purported to bar him of all right in the premises. In a suit brought to foreclose the mortgage by Strobe, the court treated the question as if Weimer had remained the owner of it, and held that the purchaser under the decree made in the former proceeding took nothing as against Weimer or his assignee. The court said: "It was stated in the complaint that he claimed an interest (in the land), and there was no allegation against its validity which called on him to defend;" and that without any allegation in the complaint contesting his title, he had a right to assume that the proceeding would be conducted upon the theory that his lien was paramount to that of the plaintiff, and that his rights were not to be affected by the proceeding. The case of *Lewis v. Smith*, 9 N. Y. 502, was cited and approved, where it was held that the widow was not divested of dower in the lands of her deceased husband, by a decree to that effect, in a proceeding, to which she was made a party, for the foreclosure of a mortgage she had not signed. The bill contained the general allegation that she claimed some interest in the premises, subsequent to the mortgagor, or otherwise. Her husband had devised her all his real estate for life with remainder over, but whether the devise was in lieu of dower or not was not stated. The court held in a suit for that purpose that she was entitled to dower in the land, and that she was not barred by the decree in the former suit. Commenting on the averments of the bill, Denio, J., said: "As a devisee of the mortgaged premises and an executrix of the mortgagor, the plaintiff was a necessary party to the bill; but in her character of his widow, entitled to dower by virtue of her coverture before the mortgage was given, she had nothing to do with the foreclosure. Having no defense to make to her interest as devisee of the equity of redemption, and

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being unable to resist the claim to a decree against her for any ultimate deficiency, she had no motive for answering the bill. It made no claim and prayed for no relief which she could defend against." Edwards, J., also commented upon the fact that the "complaint in the foreclosure suit made no allusion to the claim of dower." See also the case of *Williamson v. Probasco*, 4 Halst. Chan. 571.

Considered on reason and authority, the right of the plaintiff to recover upon the case as reserved seems clear. There is no allusion in the petition of the administrator to any lands having been conveyed to her fraudulently or otherwise, no prayer for any relief against her, except as to her dower in the lands; and it follows that the judgment of the court, that the conveyance that had been made to her of two acres and a fraction, was null and void, was itself null and void, as, if for no other reason, a judgment upon a matter not before it. Its jurisdiction as to this, if it had any in such cases, had not been invoked. It follows that the sale and deed of the lands of the plaintiff, made under its order, conferred no title on the purchaser, and that judgment should be rendered for the plaintiff as she has prayed in her petition.

Judgment accordingly.

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Municipal corporations—Negligence—Icy sidewalk—Liability—Pleading.

In a suit against a municipal corporation to recover for injuries occasioned by falling upon a slippery sidewalk, allegations in the petition which aver that the defendant is a city of the first class; that the street where the accident occurred, is a public highway within the corporate limits; that upon a sidewalk in front of property of a private owner, the city negligently suffered ice and frozen snow to accumulate, and for a number of days to be beaten smooth and slippery, and for that reason dangerous to those passing along it, and to so remain for some days, of which condition the city had or might have informed itself in time to

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have made the sidewalk safe before the accident, are not sufficient to show negligence.

ERROR to the Court of Common Pleas of Cuyahoga county. Reserved in the District Court.

The plaintiff commenced her action by filing in the court of common pleas of Cuyahoga county a petition which is, in substance, as follows :

At all the times hereinafter mentioned the defendant was, from thence hitherto has been, and still is, a municipal corporation, being a city of the first class, and as such corporation it had and has custody, care, and supervision of all the public streets and highways within the corporate limits of said city, and was and is bound to keep the same free from obstruction and danger, and safe for persons passing along the same. On the 3d day of January, 1878, Wood street was a street and public highway within said corporate limits, and it was then and there the duty of defendant to keep said street and the sidewalks thereon, and forming part thereof, safe and free from the accumulation of ice or snow which might become dangerous to persons passing along the same, to acquaint itself with any dangerous obstruction or accumulation of ice or snow casually occurring, and to forthwith remove the same upon obtaining such knowledge. Yet defendant disregarded its said duty in the premises, and did not keep said sidewalk free from accumulation of snow and ice dangerous for such persons, and either failing to acquaint itself with the existence of such dangerous accumulation of ice and snow, else knowing thereof did not remove such dangerous accumulations upon said sidewalks upon having notice thereof. On said 3d day of January, 1878, and for a number of days next preceding, defendant had carelessly and negligently suffered ice and frozen snow to accumulate on the sidewalk on the west side of Wood street between Rockwell and St. Clair streets, in front of land then occupied by G. H. Adams, so as to become dangerous for persons passing

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along the same, said ice and snow having been beaten smooth and slippery, so that children had made a slide there, which had been there for some days previous. Of all which defendant had or might have informed itself in time enough to have made said sidewalk safe before the occurrence of the accident hereinafter mentioned. On said 3d day of January, there had been a light fall of snow, so as to cover and conceal said slide and slippery and dangerous condition of said ice and snow and sidewalk from persons passing along the same. As plaintiff was passing along said sidewalk, in the usual way, using all due care, and ignorant of its slippery and dangerous condition, she fell and was injured, etc., which accident and damages were caused wholly by defendant's negligence. A prayer for judgment follows.

To this petition a demurrer was filed by defendant, which was sustained, and judgment rendered against plaintiff. Upon error prosecuted to the district court the cause was ordered reserved to this court.

Mix, Noble & White, for plaintiff in error.

The petition alleges facts from which notice to the city is a legal inference. Constructive notice was sufficient, and the facts alleged amount to constructive notice. 2 Thomp. Neg. 762-4; Whart. Neg., sec. 963, n. 2; 2 Dill. Mun. Corp., secs. 1025, 1026; *Chicago v. Fowler*, 60 Ill. 322; *Reed v. Northfield*, 13 Pick. 94, 98; s. c., 23 Am. Dec. 662; *Howe v. Plainfield*, 41 N. H. 135; *Aurora v. Hillman*, 90 Ill. 61, 64; *Evers v. Hudson River Bridge Co.*, 18 Hun, 144; *Blakeley v. Troy*, 18 Hun, 167; *Todd v. Troy*, 61 N. Y. 506; *Twogood v. Mayor, etc.*, 102 N. Y. 216; *Baltimore v. Mariott*, 9 Md. 160, 177.

We do not claim that the city is bound at all events to keep its streets safe from slipperiness. We do not claim that it is bound to use extraordinary efforts to this end. But we do insist that it is bound to use reasonable diligence to keep the streets reasonably safe from dangers to persons using due care, from whatever cause such dangers

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arise. That the defect arises from natural causes does not exempt the city from liability; nor does the intervention of a wrong-doer. *Palmer v. Portsmouth*, 43 N. H. 265, 268; *Chamberlain v. Enfield*, 43 N. H. 356; 2 Thomp. Neg. 787, 788; 2 Dill. Mun. Corp., sec. 1024. Indeed, the question of the cause of the defect seems immaterial. As soon as the defect exists, and the city has real or constructive notice, a duty arises, on the part of the city, to use reasonable care and diligence to remove the defect or guard against injury therefrom.

The whole chain of authority that the city is not liable for slippery sidewalks rests on Massachusetts decisions. To evade the supposed effects of a statute, the courts of that state indulged in some judicial legislation. The courts of some of the other states, influenced by this authority, and without examining the reasoning, have adopted the result. But whenever the question has been examined, on principle, the ruling has been in our favor.

The Massachusetts decisions are not applicable to this state, because (1) they rest on doctrines as to the liability of New England towns which are not in force as to municipalities in Ohio; (2) they depend on a Massachusetts statute which has no counterpart in Ohio; and (3) these decisions overruled four earlier decisions of that state and have led to such evils and to so much contest by the bar of that state that, after much conflict of decision, the supreme judicial court has nearly refined away the rule. The following are the cases referred to: *Stanton v. Springfield*, 12 Allen, 566; *Loker v. Brookline*, 13 Pick. 343, 346; *Springer v. Bowdoinham*, 7 Greenl. *441; *Hall v. Lowell*, 10 Cush. 260; *Billings v. Worcester*, 102 Mass. 329; *Horton v. Ipswich*, 12 Cush. 488; *Kirby v. Boylston Market Ass.*, 14 Gray, 249, 252; s. c., 74 Am. Dec. 682; *Shea v. Lowell*, 8 Allen, 136; *Wilson v. Charleston*, 8 Allen, 137; *Payne v. Lowell*, 10 Allen, 147; *Johnson v. Lowell*, 12 Allen, 572; *Hutchins v. Boston*, 12 Allen, 571; *Nason v. Boston*, 14 Allen, 508; *Luther v. Worcester*, 97 Mass. 268, 271; *Stone v. Hubbardston*, 100 Mass. 49, 56; *Morse v. Boston*, 109

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Mass. 446; *McAuley v. Boston*, 113 Mass. 503; *Spellman v. Chicopee*, 131 Mass. 443; *Street v. Holyoke*, 105 Mass. 82; *Pinkham v. Topsfield*, 104 Mass. 78; *Gerald v. Boston*, 108 Mass. 580; *Fitzgerald v. Woburn*, 109 Mass. 204; *Gilbert v. Roxbury*, 100 Mass. 185; *Williams v. Lawrence*, 113 Mass. 506; *Cromarty v. Boston*, 127 Mass. 329. And see *Frost v. Portland*, 11 Me. 273; *French v. Brunswick*, 21 Me. 29; s. c., 38 Am. Dec. 250; *Merrill v. Hampden*, 26 Me. 234; *Tripp v. Lyman*, 37 Me. 250.

Here we have decisions that it is right to nonsuit plaintiff if a sidewalk is sufficiently level for ordinary purposes, *Johnson v. Lowell*; if no unusual slope, *Stone v. Hubbardston*; if the slope is one inch in eight, *Gilbert v. Roxbury*. And that the lesser slopes—or one inch in forty-eight, *Billings v. Worcester*; one in eighteen, *Luther v. Worcester*; one in sixteen, *Hutchins v. Boston*, *Fitzgerald v. Woburn*—so increase the danger that it must be submitted to a jury. The city, as matter of law, is not liable if the ice has a slope of one inch in eight, *Gilbert v. Roxbury*; and is liable if it has the less slope of one inch in ten, *Gerald v. Boston*. The city is not liable unless the ice is so thick as to be an obstruction by height, *Stanton v. Springfield*; is not liable, although there is a ridge of ice, if plaintiff slips because of the slipperiness, and does not stumble, *Morse v. Boston* and *McAuley v. Boston*. A depression filled with smooth ice, level with the rest of the sidewalk, is not a defect; but the depression is a defect because it is filled with smooth ice. *Spellman v. Chicopee*.

We find fifteen cases as to icy sidewalks reaching the court of last resort of a single state, from *Stanton v. Springfield* to *Williams v. Lawrence*, in eight years, indicating wide-spread and strenuous dissatisfaction upon the part of the bar with the doctrine there established.

But this whole slippery slope distinction seems to be absurd. To say that level ice, as a matter of law, is not dangerous, is to make a presumption of law contrary to fact. If inclined slipperiness is a defect and level slipperiness is not a defect, it is clearly immaterial whether

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the slipperiness is caused by ice, grease, or glass. The slipperiness is the danger, the danger is the defect. Whether the danger is actionable or non-actionable must depend on the degree and nature of the danger, not on the material giving rise to the danger.

So other courts, attempting to follow the Massachusetts decisions, have held municipalities not to be liable for level slippery sidewalks. *Mauch Chunk v. Kline*, 100 Pa. St. 119; *Cook v. Milwaukee*, 24 Wis. 270, 274; *Quincy v. Barker*, 81 Ill. 300; *Broburg v. Des Moines*, 63 Iowa, 523; *Vandyke v. Cincinnati*, 1 Dis. 532; *McKellar v. Detroit*, 57 Mich. 435; *Smyth v. Bangor*, 72 Me. 249, 251. Other cases hold the municipality for various degrees of incline. *Perkins v. Fond du Lac*, 34 Wis. 435; *McLaughlin v. Corry*, 77 Pa. St. 109.

In the following cases, where the Massachusetts doctrine of a distinction between a dangerous slipperiness caused by level, and one originating from sloping ice, was not recognized, recoveries were sustained for damages from falling on icy, slippery sidewalks. *Cloughessey v. Waterbury*, 51 Conn. 405-420; *Hubbard v. Concord*, 35 N. H. 52; s. c., 69 Am. Dec. 520; *Darling v. Westmoreland*, 52 N. H. 401; *Clark v. Chicago*, 4 Biss. 486; *Mosey v. Troy*, 61 Barb. 580; *Todd v. Troy*, 61 N. Y. 506; *Baltimore v. Marriott*, 9 Md. 160; *Providence v. Clapp*, 17 How. (U. S.) 161; *Johnson v. Haverhill*, 35 N. H. 74; *Congdon v. Norwich*, 37 Conn. 414; *Burr v. Plymouth*, 48 Conn. 460; *Landolt v. Norwich*, 37 Conn. 615; *Dooley v. Meriden*, 44 Conn. 117; *Evans v. Utica*, 69 N. Y. 166; *Twogood v. Mayor, etc.*, 102 N. Y. 216; *Darling v. New York*, 18 Hun, 340; *Thomas v. Mayor*, 28 Hun, 110; *Kenny v. Cohoes*, 16 N. Y. Week. Dig. 206; *Rich v. Mayor*, 17 N. Y. Week. Dig. 140; *Chapman v. Silver Creek*, 20 N. Y. Week. Dig. 253. And see *Evers v. Hudson River Bridge Co.*, 18 Hun, 144; *Blakeley v. Troy*, 18 Hun, 167.

These courts, deciding the law as we claim it to be, are of high standing. Each gives the question thorough examination on principle, in most instances considering

the reasoning and results of the leading decisions on the other side. They are in harmony with all the analogies of the law, treat all defects alike, allow for varying circumstances, are reasonable, and keep distinct the province of the judge and jury. The doctrine they uphold has not and will not lead any court into the quagmires of doubt and inconsistency in which flounder opposing courts.

Allen T. Brinsmade, city solicitor, for defendant in error, contended that the provision of the statute conferring upon the council the care, supervision, and control of public highways and streets, and requiring them to be kept open and in repair and free from nuisance, imposes no liability upon municipalities for damages arising from injuries caused by mere slipperiness of the walks occasioned by ice and snow, and not accumulated to such an extent as to cause an obstruction, and cited: *McKeller v. Detroit*, 57 Mich. 435; *Stanton v. Springfield*, 12 Allen, 566; *Chicago v. McGiven*, 78 Ill. 347; *Landolt v. Norwich*, 37 Conn. 615; *Smyth v. Bangor*, 72 Me. 249; *Stone v. Hubbardston*, 100 Mass. 49; *Quincy v. Barker*, 81 Ill. 300; *Cook v. Milwaukee*, 24 Wis. 270; *Vandyke v. Cincinnati*, 1 Dis. 532; *Nason v. Boston*, 14 Allen, 508; *Broburg v. Des Moines*, 63 Iowa, 523; *McLaughlin v. Corry*, 77 Pa. St. 109; *Mauch Chunk v. Kline*, 100 Pa. St. 119; *Clark v. Chicago*, 4 Biss. 488; *Grossenbach v. Milwaukee*, 65 Wis. 31; *Hubbard v. Concord*, 35 N. H. 52; s. c., 69 Am. Dec. 520.

The law exacts of municipalities only that which is practicable and reasonable in regard to keeping the streets open and in repair, and free from nuisance. The duty of the municipality must be interpreted upon a reasonable basis, with reference to the actual condition of affairs; and things impracticable are not required from the city authorities.

It is well settled that the city should not be held liable unless it had notice of the defective condition of the sidewalk, or unless it had notice of such facts and circumstances as would, by the exercise of reasonable diligence,

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lead a prudent person to such knowledge. *Chicago v. Murphy*, 84 Ill. 224. There is no positive averment in the petition that the city had notice of the obstruction complained of.

SPEAR, J. It will be noticed that there is no allegation in this petition that the walk was itself defective. No improper construction is charged, nor is it alleged that the walk was in such condition as to be peculiarly liable to cause the formation of ice; nor was the ice rough or uneven. The place where the accident occurred does not even appear to have been upon a slope or incline. So far as the charge of negligence on the part of the defendant is concerned the *gravamen* of the complaint is: 1. The defendant is a city of the first class; 2. Wood street is a street within the corporate limits; 3. For a number of days next preceding the accident the city had carelessly and negligently suffered ice and frozen snow to accumulate on the sidewalk in front of the property of a private owner, so as to become dangerous for persons passing along the same, having been beaten smooth and slippery, so that children had made a slide there, which had been there for some days previous, of all which defendant had or might have informed itself in time to have made the walk safe before the occurrence. Putting this charge in fewer words, it appears that the defendant is a city of the first class. Wood street is one of the public highways. On a sidewalk of this street, in front of private property, the city suffered ice and frozen snow to accumulate, and for a number of days to be beaten smooth and slippery. and for that reason to become and remain dangerous. Of this condition of the walk the city might have informed itself in time enough to have made it safe before the accident.

Is this a sufficient charge of negligence? To show negligence it must be made to appear (1) that the city had notice, actual or constructive, of the dangerous condition of the walk in time to remedy it, and (2) that, having such notice, it was the city's duty to remedy it.

As to the first: For all that appears Wood street may be a street lying on the outer limits of the corporation. It may be a street but little improved, but little used, and but little frequented by the general public. If, therefore, as to every part of every public highway within the municipality it was the duty of the city to take unusual means and use extraordinary care to keep itself advised of the condition of the walks, then such duty attached to this part of Wood street; otherwise not. We say extraordinary care, because the allegation that the city "had or might have informed itself," etc., means only that it might have informed itself, which is another form of saying that it was possible to have obtained the information. The terms "a number of days" and "some days" may mean two days or more. Neither necessarily indicates a greater number than two. Now, as to the most public and frequented streets, it may be that the allegation that the accumulations were there a number of days, or some days, is sufficient to cause notice to the city to be presumed, but this would not necessarily be so as to out-of-the-way streets and those remote from business centers. It would be improbable that any city official who owed any duty in that regard would pass in the time stated under such circumstances as to make it incumbent on him to observe the condition of the walk, or that the proper city authorities would be informed of its condition from other sources. The allegations referred to are, therefore, clearly insufficient to show notice to the city. So that the plaintiff is remitted, as to this essential element, to the allegation that it was possible for the city to have obtained the information. We do not understand that a city is bound at all hazards to have knowledge of defects in sidewalks. Municipal corporations are not insurers of the safety of their public ways, or of the lives and limbs of pedestrians. The law provides that such corporations shall have the care, supervision, and control of the streets, and shall cause them to be kept open and in repair, and free from nuisance. This requires a reasonable vigi-

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lance, in view of all the surroundings, and does not exact that which is impracticable. When the authorities have done that which is reasonable in this regard they have discharged the entire obligation imposed by the law. They are not bound to use all possible vigilance in inspection or in obtaining information.

This view, if correct, disposes of the case; but, waiving this, is the petition free from infirmity in other respects? The city is bound to exercise due care to keep the streets and walks reasonably and relatively safe, but can not be required to make all streets and walks absolutely safe or equally so. The complaint is that the walk was dangerous by reason of accumulations of ice and frozen snow, which rendered it slippery. The result was due in part to the elements and in part to the beating down of the ice and snow, especially by children sliding on it. If, then, the city of Cleveland, as to all the sidewalks within the corporate limits, is liable for accidents which occur by reason of slippery sidewalks, of the condition of which it has notice, then, were notice shown here, it would be liable to the plaintiff in this case. It is insisted that there is such liability. If this be the law, an onerous burden is cast upon many of our municipal corporations. In all northern cities and towns storms of snow and sleet, producing ice and resulting in slippery walks, are of frequent and constant recurrence during the winter season, and accidents of the character complained of are also frequent. Such dangers are apt to exist in many places at the same time, and at points widely separated from one another. They appear at many points to-day, disappear to-morrow, and like dangers appear at other places the next day. They are affected by changes of weather, which are likely to occur at any time, and frequently many times within a few hours. It is not unreasonable to assume that there were hundreds of similar dangerous places in the city of Cleveland at the time of the accident to plaintiff. To effectually provide against dangers from this source would require a large special force involving enormous expense; for, to make the protection

effective, constant activity and vigilance would be required as well in the ascertainment of the dangers as in their removal upon being known. Such duties do not naturally fall within the province of the police force, as that force is not a city agency for any such purpose. It would be possible to employ and pay a special force, but it does not follow that it would be reasonable to require it.

Regarding the removal of dangers, as well as regarding watchfulness in ascertaining their existence, the municipality is bound to exercise only ordinary care; to take such measures as are reasonably to be required and adequate, in view of the ordinary exigencies. The condition of the walk in this case is not complained of as a defect in the sidewalk, but rather an accumulation on it which created a nuisance. This was transient in its character, and not such as to ordinarily require the interference of the city authorities for its abatement. Those authorities are empowered to clear the streets from snow and filth, and, by ordinance, to require property owners to keep the walks cleared from snow and ice, but ordinarily liability does not attach for a failure to do so. Slipperiness may arise from a variety of causes. A thin film of mud on the walk will often produce it, and yet liability would hardly be claimed to arise from such cause. It is not clear, on principle, that an exception should necessarily be made in regard to slipperiness from accumulations of ice.

We have considered the numerous authorities referred to by counsel in the able and elaborate printed brief, and have read the argument with much pleasure. It invites to an extended discussion of the subject and a review of the authorities. We doubt whether good would result from extended discussion, or from an attempt to weigh the arguments in the conflicting decisions of other states, or even from a lengthy review of those decisions, and hence do not enter upon either, but are content to rest this branch of the case, as to the duty of the city regarding removal of ice from the sidewalks within the municipality, on the ground tersely put in substance by counsel for defendant, that the law exacts of munici-

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palities only that which is practicable and reasonable in regard to keeping streets open, in repair, and free from nuisance; that the duty of the municipality, under the statute, must be interpreted upon a reasonable basis in reference to the actual condition of affairs; that impracticable things are not required, and that to hold the city liable, under the allegations of this petition, would be to require that which is impracticable, and to impose an onerous and unreasonable burden upon it.

Whether or not a case might be made, growing out of a peculiar situation of a walk at a greatly frequented place upon one of the most public streets wherein the city might be held for damages arising from slipperiness of ice alone, we need not here consider. Such a case has not been made.

The petition does not state a cause of action, and the judgment of the court of common pleas is affirmed.

HOLBROOK v. IVES.

Mechanic's lien—Death of owner—Right of material-man to continue work and perfect lien—Priority over judgment.

1. By virtue of the provisions of section 3205, Revised Statutes, when the progress or completion of the work on any house is suspended by the decease of its owner, a "material-man," who had a contract with such owner to furnish material for such house, and who has not consented to such suspension, may proceed with such work in accordance with the terms of the original plan; and, on completion thereof, he may perfect a mechanic's lien on the property for the work so done, and for the material so furnished.
2. Such lien is superior to that of a levy upon the property, made, after such decease, by a judgment creditor of the devisee of such decedent, though such levy was made before such work was done.

ERROR to the District Court of Hamilton county.

On the first trial of the case in the superior court, the court found and held for Holbrook, which judgment the district court reversed as to the lien for \$1,018.68, and it remanded the case for further proceedings.

On the next trial of the case, the court found the facts, from which findings the following facts are taken :

Maria Plant died April 27, 1882, leaving a will, by which she provided for the payment of her debts and the expense of administering her estate, and she gave all the rest and residue of her property to Thomas Plant, her husband ; and she appointed J. F. Baldwin executor of her will.

She left no personal property, but died seized of a certain leasehold estate described in the petition. One Marsh, the owner of the fee of the lot, had obtained a judgment against her on the 27th day of January, 1880, which was wholly unsatisfied at the time of her death.

At the time of her death there was standing on the west half of said lot a frame building, which had been erected by her. Shortly prior to her death she had commenced the erection of a house on the east half of the lot, which, at the time of her death, was somewhat less than half completed. This leasehold estate, at the time of her death, was worth some \$2,500 ; but on account of the unfinished and unsalable condition of the east house, it was not likely to bring so much at public sale.

"Fifth. Prior to March 7, 1882, Maria Plant had contracted with the defendant, S. S. Holbrook, a dealer in lumber and building material, to furnish and deliver certain lumber and material in his line, necessary to build the east house, the same to be delivered from time to time, as required by her husband, Thomas Plant. Thomas Plant was and is a carpenter and builder by trade, and was superintending and building the east house, and had designed the plan for the same, which plan had been adopted and approved by Maria Plant, but the same was not reduced to writing, or placed on paper, except a slight sketch of front elevation, not offered in testimony.

"Sixth. Holbrook commenced to deliver lumber under the

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contract, about March 7, 1882, and prior to Maria Plant's death had delivered, in pursuance of the contract, lumber and material amounting to \$419.12, which was used in erecting the east house; from and after the death of Maria Plant, all work and progress on the east house was suspended on account of her death.

"Seventh. Holbrook, on the 29th day of May, 1882, filed in due form, and obtained a valid mechanic's lien on the leasehold, to secure the payment of the sum of \$419.12 and interest, as set forth in the first count of his answer and cross-petition herein.

"Eighth. There were some \$2,000 of liens on the leasehold, prior to the lien of Holbrook for the said sum of \$419.12. Said east house, at the time of Maria Plant's death, was in an unsalable condition, by reason of its being only partly completed. It was also, for the same reason, unprotected from the weather, subject to be drenched, inside as well as outside, at each rain storm, and subject to rapid depreciation in value by the elements, unless speedily finished.

"Ninth. Holbrook had no actual knowledge, until after Maria Plant's death, of any liens on said leasehold prior to his lien for the sum of \$419.12, but having learned of the existence of the prior liens—prior to July 1, 1882—he had good reason to believe that, if the leasehold should be sold at public auction with the east house, in its then unfinished and unsalable condition, it would not bring enough to pay the prior liens upon it, and pay in addition his claim for \$419.12.

"Eleventh. No work was done, nor was any progress made on the east house from the death of Maria Plant until July 1, 1882. Thomas Plant had in the meantime declared to Holbrook that he was unable to finish the house himself, for want of means, and thereupon, on July 1, 1882, Holbrook, as such material-man, caused the work on the east house to be recommenced, and then and thereafter, as the same was needed, furnished and delivered all the remaining lumber and building material in his line necessary to com-

plete the east house according to its original plan and design; which lumber and material, so furnished and delivered, was used in the completion of the east house, and amounted in the aggregate to the sum of \$268.52.

"Holbrook also employed and paid Thomas Plant to superintend the completion of the east house according to the original plan, and to do the remaining carpenter work thereon; and employed and paid other mechanics, and paid for other material not in his line necessary to the completion of the east house. So that Holbrook paid out in cash for the completion of the east house the sum of \$755.16, in addition to the amount of material in his own line, furnished as above shown, making altogether the sum of \$1,018.68 paid out and expended by Holbrook in completing the east house. S. S. Holbrook fully completed the house on the 22d day of December, 1882, according to the plan.

"*Twelfth.* Thereupon Holbrook made an affidavit containing an itemized account of the amount and value of the lumber and material as furnished by him, and of the items of cash paid out by him in so completing the house, and a description of the leasehold, all in due form of law, for the purpose of obtaining a mechanic's lien, under the laws of Ohio; and on the 5th day of April, 1883, duly filed the same with the recorder of Hamilton county; and the same was thereupon duly recorded. This was so done by Holbrook, for the purpose and with the intent of obtaining, having, and securing a lien on the leasehold, to secure to himself the payment of the sum of \$1,018.68 and interest, under the provisions of section 3205 of the Revised Statutes of Ohio.

"*Thirteenth.* J. F. Baldwin was duly qualified, and is still acting as executor of the will, and was at the same time the attorney for the plaintiff herein.

"*Fourteenth.* About the time Holbrook commenced to finish the east house, he agreed with J. F. Baldwin that he would keep a correct account of all the items of labor, cash, and material used in finishing the same; that he would

finish the same as economically as possible, and that, in taking his lien for the costs and expenses of completing the house, he would charge only for actual cash paid out and the regular market prices for material furnished by him. Baldwin also prepared a written agreement, which was signed by Baldwin as executor, by Holbrook, and by the creditors of Thomas and Maria Plant, except A. Ives & Sons, prior to July 1, 1882, providing for the completion of the house upon the terms above mentioned. Said written agreement could not be found, and the paper is not in evidence, but the foregoing is the substance of the same as determined by parol testimony.

"Holbrook fulfilled his agreement in that respect in good faith, and his bill, \$1,018.68, for the completion of the house, is a just and reasonable bill.

"In consideration of the above agreement on Holbrook's part, J. F. Baldwin, as attorney for plaintiff, agreed not to cause the leasehold to be sold to satisfy plaintiff's judgment herein until Holbrook should have reasonable time to complete the east house.

"*Fifteenth.* Thomas Plant, and many of the unsecured creditors of Maria Plant and of Thomas Plant, advised J. F. Baldwin that in their judgment the leasehold would realize more for the unsecured creditors, if, before selling the same, he would allow Holbrook time to complete the east house, and to have his lien on the leasehold for the cost of completion, than it would realize for them if he should expose the leasehold to sale at once, with the east house in its unfinished condition, which advice was also embodied in the written agreement; but the defendants, A. Ives & Sons, were not consulted, and expressed no opinion on the question.

"*Sixteenth.* At the time of Maria Plant's death, the defendants, A. Ives & Sons, held a valid judgment of the court of common pleas of Hamilton county, against Thomas Plant, for the sum of \$511.58, and interest at eight per cent from May 5, 1879.

"On the 16th day of May, 1882, defendants, A. Ives &

Sons, by virtue of the judgment, caused execution to be duly levied on the interest of said Thomas Plant in said leasehold estate.

"*Seventeenth.* On the 23d day of May, 1883, the leasehold estate was sold by order of this court, to satisfy plaintiff's judgment herein, rendered January 27, 1880, for the sum of \$1,100, and S. S. Holbrook became the purchaser thereof at said sale.

"The proceeds of the sale have been distributed by order of court as follows :

1. Costs of this action, \$89.54.
2. Taxes, \$110.39.
3. Plaintiff's judgment for money loaned, \$1,482.49.
4. Plaintiff's judgment for rent, \$152.61.
5. Rents accrued since said judgment, \$230.44.
6. Holbrook's first mechanic's lien, \$451.60.
7. Paid to the executor, \$535.83.

"Leaving a balance undistributed of \$1,047.10, which is the amount claimed by Holbrook for completing the east house, in the second cause of action set forth in his cross-petition herein, and interest thereon, to the date of said order of distribution.

"*Eighteenth.* Maria Plant was owing debts at the time of her death, secured and unsecured, in the aggregate upward of \$3,400. She left no property other than the leasehold estate above mentioned, some of which debts and claims are contested by A. Ives & Sons.

"*Nineteenth.* And at request of counsel for A. Ives & Sons, the court finds the following: Prior to Maria Plant's death, Baldwin had loaned to his client, the plaintiff, B. K. Marsh, the sum of \$600, with the verbal agreement that he should retain the same out of the money collected by him on plaintiff's judgment herein, provided Marsh should not sooner repay Baldwin said sum.

"About September, 1882, Baldwin advanced to Marsh the balance then due him on said judgment, after deducting the sum of \$600 and interest, and thereupon became the equitable owner of said judgment. About June 6, 1881,

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Baldwin purchased from Marsh the fee of said lot, subject to said lease, and paid therefor the amount of purchase-money, named in the privilege purchase contained in the lease, and all ground rents accrued under the lease up to date of purchase. And on distribution herein, the several sums ordered paid to plaintiff were in fact paid to Baldwin in his own right.

"And as conclusions of law, resulting from the above stated facts—protesting against but following the decision of the district court, reversing, in part, a former judgment herein—the court find that S. S. Holbrook did not obtain a lien on the leasehold to secure the payment of said sum of \$1,018.68 and interest, as alleged in said second count in his answer and cross-petition, and that he was not entitled to a lien thereon for the material furnished by him, and the cash expended after Maria Plant's death in completing said east house, and is not entitled to have said sum of \$1,047.10 paid over to him on distribution.

"It is therefore ordered that Herman Merrell, master commissioner, pay over the balance in his hands, amounting to \$1,047.10, to J. F. Baldwin, as executor of Maria Plant, to be accounted for by him, according to law and the will of the testatrix, and that defendant, S. S. Holbrook, pay the costs herein.

"To all of which conclusions of law and judgment, defendant, S. S. Holbrook, by his counsel, excepts."

On proceedings in error the district court affirmed the judgment of the superior court, and S. S. Holbrook now seeks a reversal of those judgments.

Archer & McNeil and J. F. Baldwin, for plaintiff in error.
Ferris & Wilder, for defendants in error.

FOLLETT, J. Is Holbrook, as a "material-man," protected by section 3205 of the Revised Statutes?

That section provides that: "If the progress or completion of the work on any property designated in this chapter, be suspended by the default or decease of its owner, with-

out consent of such head or sub-contractor, or material-man, he or they, or any of them, may proceed with the work, in accordance, however, with the terms of the original plan or contract, and on completion thereof, have either or all the remedies provided by this chapter."

The terms of this section are plain and need no construction.

If the work be *suspended* by the decease of the owner of the property, and such suspension is without the consent of the head contractor, or of the sub-contractor, or of the material-man, he or *they, or any of them*, not consenting to the suspension, may *proceed* with the *work* in accordance with the original *plan or contract*. And on the completion thereof, such person or persons may have either or all the remedies provided in that chapter, including the benefits of a mechanic's lien.

The facts found in this case are: That Maria Plant owned the leasehold estate and the buildings thereon; that "shortly prior to her death she had commenced the erection of a house on the east half of the lot, which, at the time of her death, was somewhat less than half completed;" that she had "adopted and approved" a *plan* for the house, which plan Thomas Plant had designed; that she had contracted with Holbrook to furnish and deliver certain lumber and material, in his line, necessary to build the house, and to deliver the same, from time to time, as required by Thomas Plant, the husband; that prior to her death a part of the material was furnished by Holbrook in accordance with their contract; and that the *progress* of the work was *suspended* by the decease of Maria Plant, the owner, without the consent of Holbrook, the material-man.

Thus every required *precedent* condition was fulfilled; and Holbrook, the material-man, did proceed with the work, in accordance with the terms of the original plan, and did complete the house.

It is claimed that *Holbrook's* contract with the owner *deceased* did not provide for the completion of the house by *him*. The language of his contract *alone* did not so provide;

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but his contract was made under the provisions of section 3205 of the Revised Statutes, and the clear provisions of that statute became a part of the contract; and these provisions were of full force on the *suspension* of the *progress* of the work by the decease of Maria Plant.

"The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract, and this is so, whether such laws effect its validity, construction, discharge, or enforcement." *Roberts v. Cocke*, 28 Gratt. (Va.) 207.

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." Mr. Justice Swayne in *Von Hoffman v. City of Quincy*, 4 Wall. 550.

It is also claimed that a mechanic's lien is an *entirety*, and that Holbrook could not have two such liens in this case.

If we concede the former claim, the latter one would not follow. During the life-time of Maria Plant, Holbrook could *only furnish materials* for the house; and, upon her death, for such materials *furnished* he could perfect his lien therefor as he did; and when her decease *changed the obligations* of the contract in its *practical effect*, Holbrook did proceed with the work both as a material-man and as a workman. This he had a right to do, by virtue of his contract and the provisions of the statute. For all he thus furnished and performed he could perfect his second mechanic's lien, unless in some way he was prevented.

Did the levy of A. Ives & Sons prevent or postpone Holbrook's second mechanic's lien?

This levy was for a judgment debt due A. Ives & Sons from Thomas Plant, the devisee of Maria Plant. Thomas Plant took the property subject to the debts of Maria Plant, and also subject to her contracts respecting this property—including her contract with Holbrook, by virtue of which he obtained his second lien. The levy was only upon the property interest therein devised to Thomas Plant, and it is subject to this lien of Holbrook. A. Ives & Sons could

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not obtain a better right or title than Thomas Plant possessed. The facts found, as to what agreements were made by Holbrook after the decease of Maria Plant, are important only as showing the utmost good faith on the part of Holbrook in his completion of the house under his optional contract to complete it; and, doubtless, such agreements were not *necessary* to enable Holbrook to secure his rights; but such agreements could not destroy his rights under the statutes.

The facts found show there is no equity in the claim of the defendants in error.

This expenditure of \$1,018.68 seems to have increased the salable value of the property at least \$1,600, a profit of \$581.32, which may inure to the benefit of the defendants in error. And they need not have done otherwise than stand by and see this expenditure of money, as their levy did not prevent or destroy the rights of Holbrook.

The facts of this case show clearly the importance of such a statutory provision, and its great value to material-men, to contractors, and to such workmen.

The court erred in its conclusions of law, and there was error in affirming the judgment.

The judgments below are reversed, and judgment is rendered for S. S. Holbrook.

RAILWAY COMPANY v. THURSTIN.

Error—Findings of fact by trial court—Whether order of dismissal reviewable—Section 6710, Revised Statutes.

A motion to dismiss a petition in error upon the alleged ground that summons in error was not served nor appearance entered within two years after the rendition of the judgment below, was heard in the circuit court upon evidence and sustained. No bill of exceptions was taken, but the court stated upon the record the facts found from the evidence, and

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upon which the dismissal was ordered. Upon this record the plaintiff in error seeks a reversal in this court of the order of dismissal. *Held:*

1. Section 6710, Revised Statutes, does not authorize a finding of facts in such a proceeding.
2. The order of dismissal is not reviewable upon such record, and a motion to dismiss the petition in error is well taken.

MOTION to dismiss petition in error to the Circuit Court of Lucas county.

The defendant in error recovered a judgment against the plaintiff in error, The Columbus, Hocking Valley and Toledo Railway Company, in the court of common pleas of Lucas county.

To reverse this judgment the latter filed its petition in error in the district court.

After the lapse of two years the defendant in error moved the circuit court to strike the petition in error from the files and the case from the docket, for the reason that no service of summons had been made nor appearance entered within two years from the rendition of the judgment.

The motion was heard by the circuit court on affidavits and oral testimony.

The court granted the motion. The petition in error in this court is to reverse the judgment of the circuit court rendered upon this motion.

Certain facts which the court found from the evidence are recited in the record, and the contention of the plaintiff in error is that these facts did not warrant the action of the court upon the motion to dismiss. No bill of exceptions was taken showing the evidence upon which the court made its findings of facts. The circuit court did not pass upon the merits of the case as exhibited by the record of the court of common pleas, and no part of that record is in this court.

The questions now before this court for consideration arise upon the motion of the defendant in error to dismiss the proceeding in error for the alleged reason that the court has no jurisdiction of the subject-matter.

The foregoing statement embraces as much as is necessary to present the question considered and disposed of by this court.

James A. Wilcox and Doyle & Scott, for plaintiff in error.
Joshua R. Seney, for defendant in error.

OWEN, C. J. The solution of the question at bar rests upon the construction of section 6710, Revised Statutes, as amended May 4, 1885 (82 Ohio L. 230), which provides, among other things, that: " . . . the supreme court shall not in any civil cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of the evidence; and on application of any party excepting to a ruling or decision of the circuit court, during the trial, or on motion for a new trial, such court shall find from the evidence, and state on the record, the facts upon which the alleged error arises or which may be material in determining whether error has intervened or not."

It is maintained by the defendant in error that this court has no power to entertain this proceeding in error upon the finding of facts set forth in the record, in the absence of a bill of exceptions containing all the evidence upon which the circuit court disposed of the motion to dismiss. On the other hand, the plaintiff in error maintains that a bill of exceptions would have been an idle form, as the weight of evidence can not be reviewed by this court upon such bill; and that the only means of bringing such question before this court for review is by a finding of facts under section 6710, Revised Statutes. Conceding that a bill of exceptions would not require this court to review a judgment or order below upon the weight of the evidence, the fact remains that if such judgment or order be against the facts established by the uncontradicted evidence presented by the bill of exceptions, there would be power to review and reverse such judgment as a question of law.

The question before us must turn upon the construction of so much of section 6710 as provides that "on application

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of any party excepting to a ruling or decision of the circuit court *during the trial* . . . such court shall find from the evidence, and state on the record, the facts upon which the alleged error arises," etc.

Was the hearing of the motion to dismiss in the court below such proceeding as may be termed a "trial?" We are in full accord with counsel for plaintiff in error when they say in argument: "The word trial in this section is of course used in the sense of the general definition given to it by the Revised Statutes, section 5127, which declares that 'a trial is a judicial examination of the issues, whether of law or fact, in an action or proceeding.'"

What are "issues," as that word is here employed? The court is unanimously of the opinion that this question is satisfactorily and conclusively answered by the four succeeding sections, in the light of which it seems reasonable to construe this word "issues." They are here given in full.

"Sec. 5128. Issues arise on the pleadings where a fact, or conclusion of law, is maintained by one party and controverted by the other. They are of two kinds. 1. Of law. 2. Of fact.

"Sec. 5129. An issue of fact arises: 1. Upon a material allegation in the petition denied by the answer. 2. Upon a set-off, counterclaim, or new matter, presented in the answer and denied by the reply. 3. Upon material new matter in the reply, which shall be considered as controverted by the opposite party without further pleading.

"Sec. 5130. Issues of law must be tried by the court, unless referred as hereinafter provided; and issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial be waived, or a reference be ordered as hereinafter provided.

"Sec. 5131. All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred."

It seems clear that the issues here referred to are those

which arise upon the pleadings and do not relate to controversies involved in summary proceedings like the one now under consideration, although the pendency of the action in which it is involved depends upon the disposition of it by the court.

This view seems to be strengthened by the construction given by this court to section 7356, Revised Statutes, in *Wagner v. State*, 42 Ohio St. 537. This section relates to the review of criminal proceedings, and concludes with the provision: "But in the supreme court only errors of law occurring at the trial, or appearing in the pleadings or judgment, can be reviewed."

In that case it was held that: "'Trial,' in the sense of this limitation, has reference to a trial upon a plea in bar, and does not extend to a hearing on a motion to quash, or trial upon a plea in abatement; it commences, at least, when the jury is sworn, and embraces questions as to the admissibility of evidence, refusals to charge, and the charge given, and the like; and it ends with the rendition of the verdict."

The construction already indicated is supported by the provision of section 6710, that "on application of any party excepting to a ruling or decision of the circuit court *during the trial*," the court shall state its findings of fact, etc. This seems to contemplate an exception to some ruling of the court during the course of the hearing, rather than an exception to the final judgment or order of the court by which the controversy is determined.

A legislative provision should quite clearly indicate that such was the purpose of its enactment, to authorize the construction that upon each summary proceeding arising upon motion, and not involving the merits of the action, the court is required to make and state a finding of the facts upon which the disposition of such motion is made to rest.

There was no authority in the circuit court, derived from section 6710, to make a finding of facts upon which, in the

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absence of a bill of exceptions, the action of that court can be reviewed in this.

The finding of facts is improperly in the record. *Lockhart v. Brown*, 31 Ohio St. 431. As the only exception taken in the circuit court by the plaintiff in error was to the action of the court in dismissing the proceeding in error, and as that action is not reviewable, upon the record before us, the motion of the defendant in error is well taken, is allowed, and the

Petition in error dismissed.

CASSIDY v. HYNTON.

Will—Construction—Widow and children—Trust.

ERROR to the District Court of Cuyahoga county.

The question in this case is as to the sufficiency of plaintiffs' amended petition. Without copying the pleading at length, its substance may be stated. On the 21st day of September, 1865, John Hynton, a resident of Cuyahoga county, was the owner of a parcel of 134 acres of land in that county, worth \$10,000, and 147 acres in Summit county, worth \$9,000; also stock, farming utensils, and money at interest of the value of \$5,000. Elizabeth Hynton, the defendant, was then his wife, and they then had four children living, viz: Mary, aged about 21 years; Catharine, about 18; John, 16; and Elizabeth, 13 years. On that day John Hynton made a will, which is as follows:

"Know all men by these presents: That I, John Hynton, of the township of Independence, county of Cuyahoga, and state of Ohio, being of sound mind and memory, and not under any restraint, do hereby declare and establish this my last will and testament.

"I bequeath to my beloved wife, Elizabeth, all my property, real and personal, to be solely under her care and

management, in trust for the benefit of mine and her children.

"She may distribute it at any time and in any manner that she may think proper."

Elizabeth Cassidy and Catharine Walsh, plaintiffs, and Mary Doubler and John Hynton, defendants, are the children named above.

On the 25th of September, 1865, the testator died, leaving the wife and children named, all of whom still survive. The will having been duly proven, the widow appeared in probate court and elected to take under the will. She was at the same time appointed administratrix with the will annexed, and gave bond as such in the sum of \$1,000. No inventory of personal property was taken, nor *appraisal* had, nor report of any sale. On the 19th of October, 1866, she filed in probate court a sworn statement, alleging the payment of all debts, which the court received as a final settlement. No other settlement was ever made.

Immediately after the death of John Hynton she took possession of all the property, and took, received, and kept all the rents, income, and profits, and has continued to do so except as hereinafter stated, and claims all as her own absolutely. November 18, 1870, she sold and converted into money about five thousand dollars' worth of the personal property, and with the proceeds, and with income and proceeds of about eight acres of timber land sold, purchased $95\frac{34}{100}$ acres of land worth \$6,197.10, which sum she paid for it. She has distributed out of the estate to said Elizabeth, \$530; to said Catharine, \$500; and to said Mary, \$2,000. To said John she conveyed, without consideration in money or otherwise, $114\frac{26}{100}$ acres of the real estate, and John conveyed it to the defendant, Richey, who still occupies it. The land was worth \$6,322.80. Afterward, without valuable consideration, she conveyed to said John another tract of land worth \$6,175. The total value of all the property left by the testator was about \$24,000. The debts, funeral expenses, and cost of administration did not exceed \$1,000.

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The said Elizabeth Hynton claims to be sole devisee and legatee of all the property; denies that she holds any part thereof in trust; refuses to give bond for the proper discharge of the trust; has not accounted in any way for her management of the trust property, and still refuses to account. At the time of said conveyance to said John, and by him to said Richey, both of them well knew all the terms and provisions of the will, and that said lands were held by said widow in trust only.

Plaintiffs pray a construction of the will; that the defendant be ordered to render full account; that she be required to give bond; that proper order be made regarding the lands conveyed to John and the lands by him conveyed to Richey, for order that will secure preservation and ultimate distribution in equal shares of the trust property, and for full relief.

The petition was filed May 26, 1877. At the September term, 1881, of the common pleas, the case was heard and a decree rendered for the plaintiffs, from which the defendant, Elizabeth Hynton, appealed to the district court. In that court a demurrer to the petition was filed, which, on hearing, was sustained, and judgment for defendant entered. To procure a reversal of that judgment the error proceeding is prosecuted here.

Caskey & Calhoun, for plaintiffs in error.

Cadwell & Cadwell, for defendant in error.

BY THE COURT. The disposition of the demurrer to the petition depends upon the construction to be given to the will of John Hynton. It is the duty of the court to ascertain the intent of the testator. If the plaintiffs were entitled to any relief under the allegations of the petition, then the demurrer should have been overruled; if not, it was properly sustained. The counsel for plaintiffs in error claim that under the provisions of the will, Elizabeth Hynton, in her own right, took no interest in her husband's estate; that under the law she was entitled to dower in

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the lands, to a year's support, and to a distributive share of the personalty, but as to all the remainder of the estate, she took it as a devisee in trust for the equal and impartial benefit of all the children of herself and her husband, John Hynton. The position of counsel for defendant in error, Elizabeth Hynton, if we understand them correctly, is that under the will she took the entire estate in trust for the children, but that the trust was wholly unlimited and unrestrained, and gave her unquestioned discretion as to what she should give each child, and when; that it can not now be important whether she took an estate for life or in fee, for in either case there is no relief for the plaintiff so long as the mother lives, and that the court has no power over the trust.

It is not proposed to enter upon lengthy discussion to demonstrate what the testator meant by his will. Instruments of this character are so unlike in their terms, and the circumstances surrounding testators so unlike in their facts, that the decision of one case is not apt to aid in the determination of subsequent cases. It will suffice if we indicate the view this court takes of the rights of the parties to this litigation. We are not able to agree wholly with the construction given the will by the counsel of either of the parties. The will gives the property to the wife for the benefit of the children. She is to have the sole care and management of it, and may distribute it at any time and in any manner that she may think proper. This implies that she is to take the entire legal estate; otherwise the distribution could not be effectually made. The property described being the property then in existence, with no mention made of increase or profits, and being placed under her sole care and management, with power to make the distribution at any time she may deem proper, it follows that she may have the use of the property herself, and may delay the distribution during her life, providing she takes any beneficial interest under the will at all. The property was devised for the benefit of all the children. The will does not say in trust for such of the children as the mother

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may select, but "in trust for the benefit of mine and her children." This language, in the absence of words indicating a different meaning, must be held to give them a joint interest in it. Standing alone, the words used would accomplish this result without question. Should the clause giving power to distribute "in any manner she may think proper" necessarily be held to diminish or limit the equitable estate given the children? We think not. The words used are reconcilable with the idea that the testator's purpose was to give to the wife power to advance to each child, from time to time, from his or her equal share, such sum as might, in the mother's judgment, be beneficial. To one she might advance means for obtaining an education, to another the means to start in business, and so forth. To construe the will as giving the wife unlimited power of distribution, as to the quantity of the estate each child should have, would be to construe the term "in any manner" as if it read "in any proportion," which would allow the mother to give to three of the children one dollar each, and all the remainder to the fourth. There is no warrant for such construction.

The cases of *Collins v. Carlisle*, 7 B. Monroe, 13; *Hoey v. Kenny*, 25 Barbour, 396, and *Freedly's Appeal*, 60 Pa. St. 344, cited by counsel, have been examined. Whatever similarity is presented by these cases to the case at bar is apparent rather than real. They do not control this case, though the doctrine of the first named case, as regards the estate of the widow, applies here. The question is not what was the purpose of some other testator in using language similar, but under different circumstances, at the time of making the will, or of one using identical language, but with it incorporating other language modifying the preceding, and serving to explain his intent, but what was the purpose of this testator in using the language of this will under the circumstances in which it was made?

It is reasonable to infer that the testator intended to dispose of his whole estate, and to provide for all those entitled to his bounty. His "beloved wife" was in his mind

at the time the will was drawn, as well as their children. Why assume that he intended to provide for them and not for her? We think the will should receive such construction as will make provision for all. By electing to take under the will she accepted the benefit conferred by it, and at the same time signified her intention to assume the trust imposed. What was that? Can it be reasonably supposed that this husband intended to impose upon the wife the burden of a strict, technical trust, thus making her liable, not only for what she should actually make the property earn, but for what she might, with due care, have made it earn? We think not. Yet, if the construction plaintiffs' insist upon is correct, that result follows. She is entitled to the use of the property for her own benefit, and is legally responsible only for the original amount, the principal.

The allegations of the petition show that Mrs. Hynton has disregarded the duties imposed by the trust; that she treats not only the rents, income, and profits as her own, but all of the property as well, and claims it as belonging to her absolutely; that she has conveyed away a large portion of it to a son, the defendant, John Hynton, and he has conveyed a portion of that so acquired to the defendant, Richey, and that she is in other ways disposing of the property, and putting it beyond her power to carry out the purpose of this will. Why should these plaintiffs be required to sit by and see their estate thus wasted, and yet be powerless to prevent it? Such conduct as is here charged is a direct repudiation of the trust, and a court of equity has abundant jurisdiction to enforce the trust by compelling the trustee to present a statement in the nature of an inventory showing what property she took, and its value, as by an appraisal, and what has become of it, and to give bond in an adequate sum for the proper discharge of the duties of the trust; and, in the event of neglect or refusal, to appoint a trustee to recover and take charge of the property in the interest of the *cestui que trustent*, accounting to the widow for the net rents and profits; also, if John has

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received more than his proportion, to make such order as will eventually compel a return of the excess.

The case is not governed by section 6202, Revised Statutes, nor are the plaintiffs to be impeded in the lawful pursuit of their rights because they ask a construction of the will.

It follows that the judgment of the district court sustaining the demurrer to the petition and rendering judgment for defendants was erroneous.

Judgment reversed, and cause remanded to the circuit court of Cuyahoga county with directions to overrule the demurrer, and for further proceedings.

MINSHALL, J. dissents.

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HECK v. THE STATE.

Constitutional law—Section 6946, Revised Statutes—Sale of liquors within two miles of fair.

The clause, "whoever sells intoxicating liquors within two miles of the place where an agricultural fair is being held . . . shall be fined," etc., contained in section 6946 of the Revised Statutes, as amended May 2, 1885 (82 Ohio L. 222), includes sales made by one whose place of business is permanently located within such distance, is not in conflict with any provision of the constitution, and is a valid law.

T. D. Helea and J. T. O'Donnell, for plaintiff in error.

J. F. Wilkin, prosecuting attorney, and J. A. Kohler, attorney-general, for the state.

MINSHALL, J. The plaintiff in error was indicted at the October term, 1885, of the court of common pleas of Tuscarawas county, under section 6946 of the Revised Statutes, as amended May 2, 1885. The indictment charged that on September 30, 1885, he unlawfully sold intoxicating liquors to one C. in the county, within two miles of the place where an agricultural fair, naming it, was then and there

being held. It was disclosed by the evidence at the trial, upon a plea of not guilty, that he was then, and since 1883 had been, the owner and keeper of a saloon, located in a brick building in the village of Urichsville, in which he carried on the business of selling intoxicating liquors, and that at the time named, he then and there sold such liquors to the person named in the indictment, the same being, as charged, within two miles of where the said fair was then being held.

The jury, under the charge of the court, returned a verdict of guilty. A motion for a new trial was made and overruled, and sentence pronounced by the court. A bill of exceptions was taken setting forth the evidence, the charge of the court and its refusal to charge as requested.

The question presented by the record is, as to whether, upon the evidence, the accused is guilty of an offense within the terms of the statute, and, if so, then whether the statute is a valid one.

It is claimed that the clause in section 6946 of the Revised Statutes, as amended May 2, 1885 (82 Ohio L. 222), to wit: "Whoever sells intoxicating liquors within two miles of the place where any agricultural fair is being held . . . shall be fined," etc., is simply a revision of section 8 of the act of 1856, that punished the sale of such liquor at some temporary place, as a booth, tent, or wagon, within the distance above stated of the place where such fair was being held, and that it can not be construed to include what was not an offense under the provisions of that act.

Where the language used in a revised statute is of such doubtful import as to call for a construction, it is both reasonable and usual to refer to the statute or statutes from which the revision has been made. But where the language is plain, and leads to no absurd or improbable results, there is no room for construction, and it is the duty of the courts to give it the effect required by the plain and ordinary signification of the words used, whatever may have been the language of the prior statute, or the construction placed

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upon it. *State ex rel. Pugh v. Brewster*, 44 Ohio St. 249; *The United States v. Bowen*, 100 U. S. 508; *Allen v. Russell*, 39 Ohio St. 336; *Rich v. Keyser*, 54 Pa. St. 86. If the plain language of a revised statute is to be departed from, whenever the language of the prior one may require it, then it may be asked, what is gained by a revision? The definition of crimes must, in such cases, be sought, not in the statutes as they are found to exist, but in the language of those that have been repealed. The more rational rule must be, as we think, to resort to the prior statute for the purpose of removing doubts, not for the purpose of raising them.

The language employed in the clause in question is free from any ambiguity. It embraces the sale of intoxicating liquors at any place within two miles of the place where an agricultural fair is being held. There is nothing in the nature of the subject that would lead the mind to suppose that any discrimination was intended. The sale of intoxicating liquors, within the distance named of a fair, would be a source of the same inconvenience and annoyance to the people attending it, whether sold at a permanent place, or at a temporary one.

But it is also claimed that the law is retroactive, and so in conflict with section 28, article 2, of the constitution. The power of the general assembly to provide against evils resulting from the traffic in liquor is conferred in terms by section 9, article 15 (sched. section 18). So that every person in the state, engaged in the traffic, holds his property, employed in such business, subject to the legitimate exercise of this power by the legislature. Laws have been passed prohibiting the sale on election days, upon the Sabbath, and, also, to be drunk upon the premises where sold. No one questions the validity of these laws, and yet they are but similar instances of the power exercised by the legislature in the enactment of this law.

It is also argued that the law is not uniform in its operation, because it applies to the liquor dealer whose place of business is just within, and does not apply to the one

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that is just without the prescribed limit, and is, therefore, in conflict with section 26, article 2, of the constitution. Is this tenable? Laws made applicable to cities and villages of a certain grade and class have been sustained time and again by the court, although they do not apply to those of another grade and class. A law is general and uniform that applies to all persons and things coming within its provisions throughout the state. Its uniformity consists in the fact that no person or thing, of the description of any person or thing affected by it, is exempt from its operation.

The language of this law is general, and applies with uniformity to every person engaged in the business of selling intoxicating liquors within two miles of any place where an agricultural fair is being held. We see no error in the record.

Judgment affirmed.

FOLLETT, J., dissents.

ADLER v. WHITBECK.

Constitutional law—Intoxicating liquors—Power of legislature to tax business—Licence—Due course of law—Uniformity of operation—Act of May 14, 1886—Dow law.

1. It is competent to the general assembly of the state to impose a tax on the business of trafficking in intoxicating liquors as a means of providing against evils resulting therefrom.
2. Neither the tax so imposed, nor a provision that the same shall attach as a lien on the property in which it is conducted, constitutes a license within the meaning of section 9 of article 15 of the constitution.
3. The statute imposing the tax may provide for its collection by the treasurer of the county, as other taxes are collected; may impose penalties for its non-payment, and, for the refusal of a person engaged in the business, on demand of the assessor, to sign and verify the statement of the return. And, for an injury done him in his property, such provisions do not deprive the citizen of the due course of law, secured to him by section 16 of the bill of rights, nor are they inhibited by the fourteenth amendment to the constitution of the United States.
4. The legislature may, in providing against evils resulting from the traffic in intoxicating liquors, levy a tax upon such forms of the traffic as in

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its wisdom may seem best, without infringing the constitutional requirement (sec. 26, art. 2), that all laws of a general nature shall be uniform in their operation throughout the state.

5. The act of the general assembly passed May 14, 1886, providing against the evils resulting from the traffic in intoxicating liquors (83 Ohio L. 157) is not, in any of these respects, in conflict with the constitution of the state nor of the United States and is a valid law.

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George Hoadly, for plaintiffs in error (in oral argument).

The Dow law, considered in its legal relations, is a tax law, but, in practice, it will operate as a license law. That it is a tax law, I believe, because the section which appropriates the revenues arising from the law applies them to the support of counties and municipalities, to the relief and in diminution of the taxation for general revenue theretofore prevailing. That is what constitutes the political strength of the law before the people. But it having been established by the supreme court of the United States in *Brown v. State of Maryland*, 12 Wheat. 419, and in *Welton v. Missouri*, 91 U. S. 275, that a tax on the traffic in property is a tax on the property itself involved in the traffic; and the liquor in the hands of the saloon-keepers, who are subject to the taxation of this statute, having already been assessed, listed, and taxed as other property is taxed in Ohio, this then becomes a second tax, arbitrary in amount, on the same property. But as all taxation in Ohio on property must be measured by its true value in money, this is not a legal tax. It is no more a legal tax than a second tax on the traffic in oleomargarine, which in some parts of the state is even more unpopular than the liquor traffic; or than would be a tax on the right to cultivate farms, or to sell the farms themselves, a method of which, if Henry George's views, now coming to the front with great rapidity, should prevail among the wage-workers of Ohio as they seem to be doing in New York city, would be an easy method of enforcing George's fundamental doctrine that the ownership of land is *contra bonos mores*. If

the title of this law were "an act to raise revenue by the taxation of the liquor traffic," its contents would be more accurately described than they are by its present title. There is "no magic in names," as Judge Gholson said in *Baker v. Cincinnati*, 11 Ohio St. 534, and titles of statutes do not signify except as very feeble guides to the interpretation of the statutes themselves. In its essential character, this is an act to tax the liquor traffic and nothing else.

It is sought, however, to be sustained under the police power of the state, and much stress is laid now, and was laid by Judge McIlvaine in *State v. Frame*, 39 Ohio St. 399, on the language of section 18 of the schedule, as giving power to provide against the evils resulting from this traffic. But this is to exaggerate and misinterpret schedule section 18. The legislature has no greater power to provide against the evils resulting from this traffic than it has to provide against any other evils, resulting from any other traffic or source whatever. The reason why schedule section 18 was adopted was to prevent the conclusion that the denial to license the liquor traffic might withdraw from the legislature the power to legislate against its evils. It is provision *ex abuntanti cautela*. No one can successfully deny, that under the general grant of legislative power, the right to legislate against all other evils is as full and complete as under schedule section 18, to provide against the evils resulting from the liquor traffic. The question then arises, can the power of taxation be used as a method to provide against this class and every other class of evils? We deny this. A tax is a burden for revenue, and for revenue only. Whart. Com., sec. 405. Its incidental effect may be widely different, but its direct and primary effect is for revenue, and that alone. When a burden is laid for other purposes than taxation, it is not a tax, and if it were a tax, it would be controlled by the clauses of the constitution which require taxation to be in proportion to the true value of property measured in money. A burden levied under the exercise of the police power is

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either a license fee or a fine. If levied in advance of the commission of the act, it is in the nature of a permit or an indulgence; if levied after the act, it is a fine. If levied by way of punishment, or to have a deterring effect, whatever it may be called, it is a penalty, and being a penalty, can not be imposed except by due process of law, which means an indictment or information, a trial and a sentence; in other words a proceeding under the protection of the bill of rights, and this is *judicial* action. Taxation is the result of the exercise of *legislative* power; licenses are the result of the exercise of *executive* authorized by legislative power; fines and penalties involve *judicial* action. And there can be no license to traffic in intoxicating liquors. That is forbidden by the Ohio constitution. This tax can not be sustained as a fine or penalty, because it is not the result of judicial action. And private property is inviolate, subject only to be taken upon due process of law, upon compensation or by the effect of legal taxation, or by the judicial department in the levy of fines and penalties.

But it is said that this taxation is legal as special taxation to raise a fund equal to the pecuniary loss caused by the evils of the liquor traffic. This argument dispenses with section 2, article 12, of the constitution *in toto*, because all the expenses of the state or nearly all, are caused by the necessity of providing against evils of some kind, and if the general assembly can provide against this class of evils by special taxation on the property or on the persons of the dealers which caused it, then the fire departments of all our cities may be sustained by a special tax on dwellings, stores, and other inflammable property, and the judicial department of the state may be sustained by a special tax on the property which is brought into litigation, or on the persons of the litigants; and so with an infinity of illustrations. If we keep to the ordinary definition that taxation is for revenue, and to the theory of the constitution that taxation for revenue is leviable only on property in proportion to its true value in money, a theory which has been repeatedly

sustained by this court, we shall not get far from the true rule.

We do not deny that where the power to tax is unlimited, police results may be obtained through the agency of the exercise of such a power. Thus the federal government has taxed the state banks out of existence, and is now trying to tax oleomargarine out of existence by the exercise of its unqualified and unlimited power to tax. If there were an unlimited power to tax in Ohio, beyond all doubt the Dow law might be sustained as a tax law. But you can not reason in the reversed direction; you can not say that because there may be an incidental police result following from the exercise of an unlimited power to tax, therefore the unlimited power to tax is the result of the incidental police power. It is not claimed, it can not be asserted, that the Dow law has any police effect, except that it may close a few saloons, and thus by diminishing the number of places where liquor is sold, in some remote, or rather fanciful degree, diminish the temptations of the traffic, and thus lessen its evils.

Assuming, what we do not believe, that such will be the result, let us inquire whether the legislature has power to provide directly for the limitation of the number of saloons. What would be the effect of a law reducing the number of saloons in Franklin county to one hundred, and providing that the first one hundred that might register themselves, or the first one hundred that might be established, should be the lawful dealers; or that lots should be drawn, or providing in any way that may be imagined by the court? Such law is simply to license the one hundred, and that others should be forbidden.

Thus the direct exercise of the police power in the diminution of saloons is only reached by license to those who are left in the traffic. The force of the human imagination is not sufficient to suggest any other method of reaching the result. The consequence is that the argument of the learned counsel in support of the law comes to this: That the taxation is legal because its indirect effect is to diminish

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the number of saloons, but as the direct diminution amounts to a license of those who are left, is unlawful. Therefore the taxation is unlawful, as it seems to us.

Finally, we ask the court, out of respect for itself and the law, to define what this tax is. We believe that the process of definition will lead infallibly to the conclusion that the law is unconstitutional. There are only three possible categories: This law is a tax law, or it is a license law, or it is a law providing for fines and penalties; or it combines the characteristics of two or of the whole three of these. There is no other category. But on each one of these it is unconstitutional, and all of them combined do not help the statute.

E. W. Kittredge and George Hoadly, for plaintiffs in error.

The act is unconstitutional, because it attempts to provide general revenue for municipal corporations, counties, and the state, by a tax upon property, not levied by a uniform rule according to its true value in money, and is therefore in violation of section 2, article 12, of the constitution.

The legislative power of this state, by a general provision (section 1, article 2), is vested in the general assembly; but this general grant of power, so far as the power to tax is concerned, is limited by the provisions of article 12 of the constitution, and by section 18 of the schedule. These limitations preclude the legislature from levying a poll-tax (section 1, article 12), and from levying a license tax upon the traffic in intoxicating liquors (section 18, schedule).

These express prohibitions have led the advocates of the validity of legislation of this character to endeavor to support it upon one of two propositions. They are: (1) that the imposition is an assessment, and therefore not within the restrictions; or (2) that it is a tax upon an occupation, trade or calling, and therefore not within the restrictions.

I. An assessment, in its proper legal sense, is a special tax upon real property, imposed in contemplation of special benefits derived by the property from the expenditure of the money. The power of assessment is not vested, by

the constitution, in the legislature as a principal and independent power like that of taxation. It is not referred to in article 12, which especially relates to the subject of finance and taxation. Assessment is mentioned only in section 6, article 13, relating to corporations, as an incident of the power of the general assembly, to provide for the organization of cities and villages. This relegation of the subject to that subdivision and paragraph in the constitution was not an accident.

Assessments differ from general tax levies in many other particulars than that which we have described as furnishing their defining characteristic. While an assessment may be distributed over a number of years in its collection, it is nevertheless a specific burden imposed but once for a specific purpose and applicable only to that purpose. Its object, therefore, is always local and temporary, and it is never a resource for the general and permanent purposes of government.

Its character as a local, temporary imposition for a special purpose, upon particular property to be benefited by the expenditure, has been well established. *Scovill v. Cleveland*, 1 Ohio St. 127; *Hill v. Higdon*, 5 Ohio St. 243; *Reeves v. Wood County*, 8 Ohio St. 333; *Taylor v. Palmer*, 31 Cal. 252; 51 Cal. 23; 53 Cal. 45; 56 Cal. 511; *Northern Indiana R. Co. v. Connolly*, 10 Ohio St. 165.

II. That the state may impose burdens upon certain occupations and employments with a view to the protection of the health of the citizens or for the preservation of good order or to secure the safety, convenience, or general welfare of the community, can not be denied. In general, impositions of this character take the form of licenses to pursue the calling or occupation that is thus sought to be regulated; and the regulation is in the form of a license tax levied in part to defray the presumed expenses incident to the regulation of the calling or employment, but not necessarily confined to that object, for it may extend to the discouragement and possible diminution of the business,

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which the legislature may deem beneficial to the public, and likely to follow from the imposition of the tax in excess of the amount necessary to meet any direct expenditure by the state in imposing and collecting the sum exacted.

But whenever the only regulation or restraint connected with the imposition of a burden upon a business or calling consists in the repressive tendency, which is the incident of all taxation, the imposition can not be considered as made under the police powers of the state, but must be regarded as an attempted exercise of the power of taxation.

As to the distinction existing between the exaction of money as a tax merely for revenue, and which must be justified, if at all, under the power of taxation for that purpose, and an imposition which is but an incident to the regulation of a business or employment, see *Mayor v. Second Ave. R. Co.*, 32 N. Y. 261; *Mayor v. Third Ave. R. Co.*, 33 N. Y. 42; *Jackson v. Newman*, 59 Miss. 388; *North Hudson Co. Railway v. Hoboken*, 41 N. J. Law, 71; *State v. Columbia*, 6 Rich. (S. C.) N. S. 7.

If taxes for general revenue can be imposed upon any object other than property, and if the imposition must be held to be within the unrestricted legislative discretion as being made under the police power instead of the taxing power, then clearly the only force of the constitutional provision restricting the power of taxation, is to change the name of the power and to call it the police power, when it is sought to disregard the constitutional limitation of the taxing power.

Nothing is better settled, by a line of well considered decisions of the supreme court of the United States, than that an imposition upon an occupation in the name and force of an exercise of the police power, and declared by the legislature to be such, will yet be construed to be, as it is in fact, an exercise of the taxing power, and an imposition of a tax upon the property used in the prosecution of the occupation, unless it is found to be fairly, by analysis of the law, a part of a plan of regulation of the traffic which makes the imposition something more than a mere tax.

Brown v. State of Maryland, 12 Wheat. 444; *Welton v. State of Missouri*, 91 U. S. 275.

Is it not obvious that an occupation or calling is not an entity; a thing in itself as a subject-matter of taxation? And that where the tax is imposed upon an occupation or calling, *eo nomine*, it is necessarily one of two things, viz.: A tax upon the property used in the calling, or a charge upon the privilege of pursuing the occupation or calling? If it be a tax upon property, must it not comply with the constitutional requirements and limitations upon the legislative power in levying taxes? If, on the other hand, it is a charge for the *privilege* of pursuing the occupation or calling, is not that the very character of exercise of the police power which this court has defined as constituting a license of the occupation or calling, and which the constitution, by section 18 of the schedule, has forbidden resort to for the regulation of the traffic in intoxicating liquors?

III. The Dow law, by its title, professes to be an act providing against the evils resulting from the traffic in intoxicating liquors. Every provision of the law, except the 11th and 12th sections, is devoted to providing for the levying and collection of a tax upon the business of trafficking in intoxicating liquors. These taxes are called "assessments," and their payment is enforced by heavy penalties.

It is clear that the use of the word "assessments," in the law, does not bring these burdens within what the argument has shown the law defines as "assessments" authorized upon a principle of benefits to be derived from local improvements.

No sort of regulation is provided for, or attempted, in connection with the imposition of the tax, which is for general revenue, except the discouragement of the traffic which is incident to every imposition of taxes. Upon every principle, by which legislation is to be distinguished, such an imposition must be regarded as an exercise of the taxing power, and as, in substance, the levying of a tax upon the property employed in the traffic. But if it is not a tax upon the property even employed in the traffic, it is then

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unavoidably an exaction for the privilege of pursuing this particular business.

Foran & Dawley, for plaintiffs in error.

There is no substantial difference in the effect of the statute commonly known as the "Scott law" (and which was in *Butzman v. Whitbeck*, 42 Ohio St. 223, and *State v. Sinks*, 42 Ohio St. 345, declared unconstitutional), and the present statute commonly known as the "Dow law."

This enactment, in its operation and effect, deprives the class of citizens affected thereby of their property and rights without due process of law, and contrary to the law of the land. It, in effect, takes property from the owner, without his consent, and without process of law.

A person to be affected by a law must have the right to be present before the tribunal which pronounces judgment, to be heard by testimony or otherwise, and to have the right to controvert by proof any material facts which bear on the question of right, and if any question of fact or liability is conclusively presumed against him, it is no due process of law. *Zeigler v. S. & N. A. R. Co.*, 58 Ala. 594; *Wilburn v. McCalley*, 63 Ala. 436; *Blackman v. Lehman*, 63 Ala. 547; *East Kingston v. Towle*, 48 N. H. 57; *Wauwatosa v. Gunyon*, 25 Wis. 276; *Stuart v. Palmer*, 74 N. Y. 183; *McFadden v. Longham*, 58 Texas, 579; *State v. Allen*, 2 McCord, 39, *55; *People v. Supervisors of Essex County*, 70 N. Y. 229; *Broom's Leg. Max.* 735; 1 Greenl. Ev., secs. 5, 22.

The provision in the constitution that "no person can be deprived of his property without due process of law," should receive a beneficent and liberal interpretation, without any reference to the person or the chemical or scientific qualities of the property. *Sharp v. Speir*, 4 Hill, 76; *Wynehamer v. People*, 13 N. Y. 378; *Stuart v. Palmer*, 30 Am. Rep. 289.

The legislature has no power to fix liabilities by prescribing what shall be conclusive evidence. *Little Rock & F. S. R. Co. v. Payne*, 33 Ark. 816.

We deny the right in this class of assessments to impose

any penalty except upon a judicial investigation by a competent court or tribunal, as being the imposition of punishment without trial. *Scammon v. Chicago*, 44 Ill. 269; *Wauwatosa v. Gunyon*, 25 Wis. 276; *Cooley Tax*. 313.

Boynton v. Hale, for plaintiffs in error.

The act is in direct and sharp conflict with the first clause of section 26, article 2, of the constitution, which declares that "all laws of a general nature shall have a uniform operation throughout the state."

The business of trafficking in intoxicating liquors, as defined by the statute, is taxed, but the definition excludes from its meaning, and consequently from the burden of assessment, all liquors sold by the manufacturer of the raw material in quantities of one gallon or more at one time, of his manufacture, and all such dealers are favored with entire exemption from the burden imposed by the statute. To them is accorded a privilege and immunity withheld from either the wholesale or retail dealer who sells in the same quantity.

That the act is one of a general nature can admit of no doubt. *Exp. Falk*, 42 Ohio St. 638.

It embraces a subject-matter general in its nature, pervading all parts of the state, and which, in its territorial operation, covers every locality. Has the statute a uniform operation? There is no doubt that within repeated decisions of this court, judicious classification may be made of persons and things, the subject of legislation, and that legislation pertaining to any such class is to be regarded as general. *McGill v. State*, 34 Ohio St. 228; *State v. Brewster*, 39 Ohio St. 653; *State v. Powers*, 38 Ohio St. 54; *Bronson v. Oberlin*, 41 Ohio St. 476; *Exp. Falk*, 42 Ohio St. 644.

A law which relates to persons or things as a class is general, but one which relates to particular persons or things of a class is special or private. *In re Elevated R. Co.*, 70 N. Y. 350.

The general assembly may not grant to any citizen or class of citizens privileges which upon the same terms shall not equally belong to all citizens. A general law, as contra-

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distinguished from one local or special, is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class. *Brooks v. Hyde*, 37 Cal. 375; *Iowa R. Land Co. v. Soper*, 39 Iowa, 112; *Darling v. Rodgers*, 7 Kan. 592; *Robinson v. Perry*, 17 Kan. 248; *McGill v. State*, 34 Ohio St. 252; *State v. Parsons*, 40 N. J. Law, 123; *State v. Hammer*, 42 N. J. Law, 439; *Van Riper v. Parsons*, 11 Vroom, 125; *State v. Powers*, 38 Ohio St. 54.

Thomas McDougal, *C. B. Matthews*, and *Rufus B. Smith*, county solicitor, for defendant in error.

It is settled in this state that the legislature does not derive its power of taxation from section 2, article 12, of the constitution, which provides that the legislature shall pass laws taxing by a uniform rule certain designated kinds of property. It is a restraint merely. The restriction of section 2, article 13, while it implies the power of assessment, does not create it. Neither is it created by section 2, article 12, but it arises from section 1, article 2.

It is conceded that the legislature has power to license certain classes of business, impose a charge therefor in the form of a tax, and enforce the payment of the tax as a condition precedent to the lawful prosecution of the business. *State v. Hipp*, 38 Ohio St. 225; *Mays v. Cincinnati*, 1 Ohio St. 268; *Baker v. Cincinnati*, 11 Ohio St. 534; *Cincinnati Gas L. & C. Co. v. State*, 18 Ohio St. 237; *West. Union Tel. Co. v. Mayer*, 28 Ohio St. 521.

This is said to be confined to employments which in one form or another impose burdens on the public, and it is further said that such tax can not be imposed merely for general revenue, for the *only* mode of raising such revenue is found in section 2, article 12, of the constitution. *Hill v. Higdon*, 5 Ohio St. 243; *Zanesville v. Richards*, 5 Ohio St. 589; *Cincinnati Gas L. & C. Co. v. State*, 18 Ohio St. 237; *Covington and C. Bridge Co. v. Mayer*, 31 Ohio St. 329; *Baker v. Cincinnati*, 11 Ohio St. 534.

That the legislature's power, outside of the taxation of

property, is limited to the licensing of certain employments, consisting only of those which may impose a burden upon the public, and that general revenue can only be raised under section 2, article 12, are fallacious. The last named section has been held to furnish the *governing principle* for taxes for general revenue. It has also been settled that it does not restrict the power of the legislature to tax that which is not property, nor furnish the rule for such taxation.

Nor is this power confined to employments that may be prohibited, nor to corporations that may be excluded from the state.

Taxation of occupations may be on (1) the privilege to do business; (2) the amount of business done; (3) the gross profits; (4) the net profits or dividends. *Cooley Taxation*, 384. The license is simply a convenience of form, and not the only way whereby a business may be taxed. *Ib.* 385.

A license is distinguished from the tax because the former is a condition precedent, while the other is not, and the municipality may be authorized to tax an occupation already licensed by the state. *Ib.* 386, note 4.

As to the kind of business usually taxed, see *Cooley Taxation*, 387 *et seq.*, and chapter on "Taxation of Business," generally; *Burroughs on Taxation*, sec. 6; *People v. Equitable Trust Co.*, 96 N. Y. 387; *People v. Home Ins. Co.*, 92 N. Y. 328; *Society for Savings v. Coite*, 6 Wall. 594; *Provident Institution v. Massachusetts*, 6 Wall. 611; *Hamilton Co. v. Massachusetts*, 6 Wall. 632.

These were taxes gauged by the amount of business done, deposits, etc., where always part of the property consisted of government securities, and in four of the cases the corporations were domestic, whose charter antedated the imposition of the tax.

See also *Cooley Taxation*, 20, 393, note 1; *Ould v. Richmond*, 23 Gratt. 464; *Eyre v. Jacob*, 14 Gratt. 422; *Lott v. Ross*, 38 Ala. 156; *Coite v. Savings Society*, 32 Conn. 173; *Sacramento v. Crocker*, 16 Cal. 119; *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Anderson v. Kerns Draining Co.*, 14 Ind.

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199; *Hodgson v. New Orleans*, 21 La. Ann. 301; *Glasgow v. Rowse*, 43 Mo. 479; *Adams v. Somerville*, 2 Head, 363; *Slaughter v. Commonwealth*, 13 Gratt. 767; *Carter v. Dow*, 16 Wis. 298; *Hale v. Kenosha*, 29 Wis. 599; *West. Union Tel. Co. v. State Board of Assessment*, 23 Cent. L. J. 223.

If this assessment is not prohibited by section 2, article 12, but is not within the general taxing power, can it be upheld under the police power, or the power conferred by section 18 of the schedule to provide against the evils resulting from the traffic in intoxicating liquors?

"The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manner and good neighborhood, which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." *Cooley Const. Lim.* * 572; *Commonwealth v. Alger*, 7 Cush. 84; *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 149; *U. S. v. Reese*, 92 U. S. 214; *U. S. v. Cruikshank*, 92 U. S. 542.

The extent of this power is well illustrated in *Slaughter House Cases*, 16 Wall. 36; *Munn v. Illinois*, 94 U. S. 113; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Chicago, etc., R. R. Co. v. Iowa*, 94 U. S. 155.

As to the authority of the legislature over the liquor traffic, see *Baker v. Beckwith*, 29 Ohio St. 319; *Granger v. Knipper*, 2 Cin. Sup. Ct. Rep. 482; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 666; *State v. Ludington*, 33 Wis. 107; *Miller v. State*, 3 Ohio St. 475; *License Cases*, 5 How. (U. S.) 577; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Cooley Taxation*, 396, 409; *Durach's Appeal*, 62 Pa. St. 491; *People v. Equitable Trust Co.*, 96 N. Y. 387.

Where the legislature has the power to prohibit, restrain, or regulate a business, that very power gives rise to the power to tax as a means of restraining or regulating. It

is not essential that the government should first suppress and then bargain for a resumption of the obnoxious business; it may *suffer* it to exist.

A mere tax upon the traffic in liquors is not a license, and therefore this law is free from the infirmities of the Pond law and the Scott law. It is valid under the decisions in *State v. Hipp, supra*; *State v. Frame, supra*; *Butzman v. Whitbeck, supra*; *State v. Sinks, supra*.

And is supported directly and conclusively by *Youngblood v. Sexton*, 32 Mich. 406; *Pleuler v. The State*, 11 Neb. 549; *People v. Walling*, 18 N. W. Rep. 807.

The lien clause is valid as to all tenancies not created by lease before the passage of the law. *State v. Frame*, 39 Ohio St. 399; *Provident Inst. v. Jersey City*, 113 U. S. 506.

Without regard to what things may be called, an act of the legislature must be referred to such constitutional power as may authorize it. *License Tax Cases*, 5 Wall. 462; *People v. Thurber*, 13 Ill. 554.

We deem it a work of supererogation to discuss whether the assessment named in the Dow law will provide against the evils of the liquor traffic or not. The legislative judgment can not be questioned, but we do not hesitate to assert that the worst forms of the traffic will be restrained by it. The restraint has reference to the effects as well as to the acts themselves. The amount of tax is gauged, not only by the cost of restraining the trade, but also by the cost of restraining and providing against the effects of the trade.

Hadden, Dissette & Collister, for defendant in error.

That the legislature did not *intend* to enact a law in conflict with the clause of schedule 18 of the constitution, which inhibits the license, and did *intend* to exercise the authority conferred upon it, and "by law provide against the evils resulting" from the sale of intoxicating liquors, goes without saying.

"The legislative intent" is the pole star of all judicial.

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interpretation. *Aurora Borealis v. Dobbie*, 17 Ohio, 125; *Pike v. Megoun*, 44 Mo. 491; Sedgw. Stat. Con. 214.

The act does not create the traffic. It finds it in existence and imposes a tax upon it. It does not make the payment of the tax a condition precedent to engaging in the traffic. It does not grant or attempt to grant permission to any one to engage in the traffic.

It is no longer an open question in this state whether a tax upon a business conflicts with section 2, article 12, of the constitution. *State v. Gazlay*, 5 Ohio, 14; *Baker v. Cincinnati*, 11 Ohio St. 534; *Cincinnati Gas L. & C. Co. v. State*, 18 Ohio St. 238; *West. Union Tel. Co. v. Mayer*, 28 Ohio St. 534; *Holst v. Roe*, 39 Ohio St. 340; *State v. Judges*, 21 Ohio St. 1; *Cooley Taxation*, 390-6; *Burroughs Taxation*, 67; *Youngblood v. Sexton*, 32 Mich. 406.

As to the constitutionality of the act considered as a revenue measure. *Baker v. Cincinnati*, 11 Ohio St. 534; *Cincinnati Gas L. & C. Co. v. State*, 18 Ohio St. 237; *West. Union Tel. Co. v. Mayer*, 28 Ohio St. 521; 28 Ohio St. 539; 36 Ohio St. 227; 34 N. Y. 668; 7 Wall. 77; 15 Wall. 319; 41 N. Y. 140; 32 Mich. 421.

"Due process of law" or "due course of law" means the "law of the land." The power of taxation is as old as the power of eminent domain, and laws emanating from the taxing power are in themselves "the law of the land."

An act for levying taxes and providing the means of enforcement is within the unquestionable power of the legislature. It is therefore the law of the land, not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for in order to give the rule full operation. *Cooley Taxation*, 36-40, and notes; 2 *Desty Taxation*, 749-752.

Proceedings for the collection of delinquent taxes by summary process are not obnoxious to the constitutional provision as to "due process of law." *Pritchard v. Madren*, 24 Kan. 486.

And see *Kelly v. Pittsburgh*, 104 U. S. 78; *Railroad Tax Cases*, 13 Fed. Rep. 722, and note; *Weimer v. Bunbury*, 30 Mich. 212; *Springer v. U. S.*, 102 U. S. 586; *Cowles v. Buttain*, 2 Hanks, 207; *Hagar v. Supervisors*, 47 Cal. 233.

The legislature may impose a penalty for the non-payment of taxes. *Nance v. Hopkins*, 10 Lea, 508; *Lacey v. Davis*, 4 Mich. 140; *Myers v. Park*, 8 Heisk. 550.

The imposition of penalties for non-payment of taxes is one of the means employed to enforce payment of taxes, and is a legitimate exercise of the taxing power. *State v. Consolidated V. M. Co.*, 16 Nev. 444; *Slack v. Ray*, 26 La. Ann. 674; *Morrison v. Larkin*, 26 La. Ann. 701; *Ex parte Lynch*, 16 S. C. 35; *State v. Moss*, 69 Mo. 495; *Cooley Taxation*, 309; *Genin v. Auditor, etc.*, 18 Ohio St. 534.

MINSHALL, J. The plaintiffs are persons engaged in the traffic in intoxicating liquors, and brought an action in the court of common pleas of Cuyahoga county, on behalf of themselves and others engaged in the same business, to restrain the treasurer of the county from collecting the assessments, etc., made upon the business of each of them as traffickers in intoxicating liquors, under the act of the general assembly passed May 14, 1886, entitled "an act providing against the evils resulting from the traffic in intoxicating liquors" (83 Ohio L. 157). A temporary injunction having been allowed, an answer was filed and motion made to dissolve the injunction. The motion was sustained on the ground that the petition did not entitle the plaintiffs to the relief asked, and the same was dismissed by the court. On a proceeding in error the judgment was affirmed in the circuit court; and the object of this proceeding is to obtain a reversal of the judgment of the latter as well as of the former court.

All the questions raised and argued arise upon the validity of the act above referred to, known as the Dow law.

No question is made as to the right of the plaintiffs,

separately engaged in the traffic in intoxicating liquors, to unite in maintaining this action. Each and all of them have a common and general interest in the question as to the validity of the law, so far as it imposes, or seeks to impose, a tax on the business in which each is engaged. But as to how this can be true when, as to some of the plaintiffs, it is averred that they are exclusively engaged in the traffic in vinous liquors, and have been returned by the assessors as trafficking in spirituous liquors, is not apparent. If it is intended by this averment to claim that such persons are not concluded by the return of the assessor as to their business, a question is made that is not common to the other plaintiffs. If the law be valid, relief in this regard should be sought in separate actions. It can not be had in this action, for a further reason, that their suit is accompanied with no offer to pay that which would be due from each as a person trafficking in vinous liquors. Nor does it appear from the averments of the petition, or otherwise, which, if any, of the plaintiffs, trafficking exclusively in vinous liquors, have been wrongfully returned by the assessors, as trafficking in spirituous liquors.

The general grounds upon which the invalidity of this law is asserted are: first, that it grants a license to traffic in intoxicating liquors; second, that it is in substance a tax on property not levied by a uniform rule according to its true value in money; third, that the summary methods which it prescribes for the assessment and collection of the tax are not due process of law; and fourth, that it is a law of a general nature, not uniform in its operations throughout the state. These grounds, with their respective subsidiary questions, will be considered in the order stated:

I. The competence of the general assembly to provide against the evils resulting from the traffic in intoxicating liquors by a tax levied upon the business, without infringing the provision of the constitution, that no license to traffic therein shall be granted, was recognized in *State v. Hipp*, 38 Ohio St. 199, was directly affirmed in *State v. Frame*, 39 Ohio St. 399, and was not denied in the subse-

quent cases of *Butzman v. Whitbeck*, 42 Ohio St. 223; *King v. Cappellar*, 42 Ohio St. 218, and *State v. Sinks*, 42 Ohio St. 345; and, therefore, the question, in its simple form, as to whether a tax upon the business constitutes a license to traffic in intoxicating liquors, might be regarded as settled by the previous decisions of this court, without further consideration.

But as it is still insisted in argument that such a tax is in the nature of a license, and can not be imposed without infringing the provisions of the constitution against licensing the traffic, we do not hesitate to re-examine the grounds upon which the opposite view has been rested; for, if it be clear that a tax upon the traffic in intoxicating liquors is a license, then it would be our duty to declare the law unconstitutional. The objection, however, to the tax upon this ground comes with an ill favor from those engaged in the traffic, as it has the appearance of a reproof of measures designed as a restraint upon the abuses of the traffic in which they are engaged, unless it be assumed that this provision in the constitution was inserted as a protection to the liquor interests of the state, rather than to promote the temperance and sobriety of its citizens. Such a claim has not, we believe, as yet been made; and, if made, would not be borne out by the history of its adoption, having, when before the people, been zealously urged by the friends of temperance, and as zealously opposed by those engaged in the liquor traffic of that day.

The real significance of this provision in the constitution has been a source of no little doubt and controversy. Many, if not a majority of the people of the state, supposed that if no license were granted to traffic in intoxicating liquors, the traffic would be illegal, and perish for the want of protection, and by the infliction of such penalties as might be imposed under laws made to regulate the evils resulting from the traffic. And it may be observed that the practice that had prevailed under laws enacted at an early day, and continued in force to the adoption of the constitution of 1851, of licensing the traffic in liquors as a

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beverage, had educated the people to suppose that, without a license, such traffic could not be carried on in the forms it had been usual to license it. See the history of the legislation on the subject in this state by Judge West in his argument in *State v. Hipp*, 38 Ohio St. 206, and also the able dissenting opinion of Jonnson, J., *Id.* 234. If this is a correct interpretation of the provision, it has proved a great delusion, for its practical working has been to make the traffic in a measure free. Laws, enacted for the regulation of the traffic, have not been enforced, have become in a measure obsolete, and the traffic and its abuses have grown to such proportions as to justly alarm all who reflect upon the interests of the state and society.

There seems, however, little difference of opinion as to the definition of a license. It is defined, in its general sense, by Okey, J., in *State v. Hipp*, as "permission granted by some competent authority to do an act which, without such permission, would be illegal." This agrees in substance with the definition as given in a number of other cases. *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Pleuler v. State*, 11 Nebraska, 547. In *Chilvers v. People*, 11 Mich. 43, it is said: "The object of a license is to confer a right that does not exist without a license." "The popular understanding of the word license undoubtedly is," says Cooley, J., in *Youngblood v. Sexton*, 32 Mich. 406, "a permission to do something which without the license would not be allowed," and he adds, "this is also the legal meaning." In *State v. Frame*, 39 Ohio St. 399, the language employed by McIlvaine, J., is somewhat different, but the definition is in substance the same. He says: "A license is essentially the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not enjoyed by a class of citizens to which the licensee belongs. A common right is not the creature of a license."

The result of the definitions that have been given of a license is implied in its etymology, is in conformity to the sense in which the word is ordinarily used, and may be regarded as strictly accurate. That is permitted that

can not be done without permission; and to say that a person is permitted, licensed, to do what he may lawfully do without permission, is a misuse of words.

Hence, unless it can be shown that a simple tax on the traffic enlarges the privileges of those engaged in it, or confers a right that did not previously exist, there is no ground for saying that the tax is a license of the business. It would not be claimed that a tax upon the property employed in the business, as the fixtures and stock in trade, is a license to carry it on. And yet a tax upon the business itself is no more the granting of a permission to engage in it than is the levying of a tax upon the property employed in the business. In either case, if the tax is not paid, the property of the owner liable to the tax may be distrained by the state and sold to satisfy it.

The distinction between a tax upon a business, and what might be termed a license, is, that the former is exacted by reason of the fact that the business is *carried on*, and the latter is exacted as a condition precedent to *the right* to carry it on. In the one case the individual may rightfully engage in and carry on the business without paying the tax; in the other he can not. This seems to be the distinction upon which the case of *State v. Hipp* was decided. See opinion of Okey, C. J., 88 Ohio St. 226-229; also of McIlvaine, J., in *State v. Frame*, 89 Ohio St. 412.

A simple tax upon the traffic does no violence to the principle upon which the clause, inhibiting a license, was inserted in the constitution. This inhibition certainly arose from a sentiment in the minds of the people that the traffic was wrong and should not be encouraged, not from the persuasion that it was right, and of such utility that it would be impolitic to impede it by any restrictions upon the liberty of pursuing it. By the imposition of a tax there is no sanction given of the propriety or utility of the business taxed; in the case of a license there is. The legislature finds a business productive of evils to the state and society, in which many persons are engaged, and imposes a tax upon it; in so doing, it neither directly approves

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nor disapproves the business itself. It may, however, imply a good deal. The imposition of a tax on the owner of a dog implies, if it implies any thing beyond the purpose to protect the husbandry of sheep, a disapproval of the business of keeping a dog. It is not intended to dignify the business; and the same is true of a tax imposed upon the liquor traffic.

It is further argued that the provisions of the second section, whereby the assessment is made to attach as a lien upon the real estate in which the business is carried on, has the effect of a license. The argument is that "none but the owners of real estate can carry on the traffic, unless the landless man can obtain the consent of the landowner that his real estate shall be bound for the payment of the assessment provided for by the act." This is fallacious. The right to determine who shall have leases and who not, and the terms thereof, are not prescribed by the statute. Every person has the right under the statute to rent property and engage in the business if he desires to do so. It is true, that if one, who is not the owner of real estate, desires to engage in the business, he will have either to purchase or rent it, but this would be so, whether the law did or did not impose a tax on the business. It is not the law that creates the impediment to the individual in this regard, but his own circumstances. The law does not create the necessity for a place in which to do business; this is a physical one. It does not require that it shall be carried on in leased premises; whether carried on by an owner in fee or a lessee the business is alike lawful, and all are as free to acquire real estate in any of the recognized modes as they were before the enactment of the law.

The law, in any of these particulars, is silent. It, by section 1, simply imposes an annual assessment of \$200 upon the business of every person trafficking in intoxicating liquors, and for each place where such business is carried on by him; and an assessment of \$100 where the traffic continues through the year, exclusively in malt or vinous liquors, or both; and, by section 2, provides that the

assessment shall attach and operate as a lien upon the real property on and in which the business is conducted, as of the fourth Monday of May each year, and shall be paid at the times provided by law for the payment of taxes on real or personal property.

If this law in any way impedes the purpose of any person to engage in the liquor traffic, it arises from extraneous circumstances, and not the law. But, if it were otherwise, would that make it a license law? As shown, the nature of a license is to create a right that did not exist and could not exist without the license. An impediment is of the opposite effect; it confers no right that did not exist; it simply impedes or burdens an existing one. It is within the power of the legislature to provide against the evils resulting from the traffic in liquors. Impediments to the transaction of the business may be one of the most efficient modes of accomplishing this; and where they arise from laws general in terms they can not be characterized as a license of the traffic, though some may be impeded more than others.

It is further argued that the law is a license itself. It is true that under this law liquor may be sold to be drank on the premises where sold. In this respect a part of the traffic has been legalized that was illegal before. This, however, was not accomplished by the levying of a tax on the traffic, but by the repeal of a law that made such sales illegal. It was competent to the legislature to have repealed this law without authorizing the levy of a tax. If this had been done, would it be claimed that the repeal was a license within the meaning of section 9, article 15 (section 18 of the schedule)? If such construction were allowed, then any statute restraining the liquor traffic in any form, when once enacted, would, by force of the constitution, become as immutable as were the laws of the Medes and Persians. So absurd a position would not, we suppose, be taken by any one; for it must be conceded that, however unwise it would be to do so, it is competent to the legislature to re-

peal every statute that has been enacted regulating the traffic; and it would then be as free as the traffic in any thing else. Now, if this were done, and the legislature should then impose a tax upon the business, what new privilege would thereby be conferred on the traffic? In what way would the payment of the tax be a license to do what the individual had an unbridled license to do before he paid it? It is then apparent that, to avoid the most palpable absurdities, a meaning must be attributed to the term license, as used in the constitution, that is other and different from what is imputed to it in the argument of counsel—that the tax imposed upon the liquor traffic by this statute is a license to engage in the business.

II. The next question that arises is, as to the power of the general assembly to impose a tax upon the business of trafficking in intoxicating liquors. It matters not what propriety in the use of terms may require us to designate the power under which this tax has been imposed by the legislature, if it can reasonably be shown to exist, that should restrain any court from declaring the statute unconstitutional; nay, more, if it were doubtful a court should refrain from so doing. The making of laws is committed to the general assembly; it is the judge of the wisdom and policy of all its enactments, and no court has the right to overrule its judgment, even as to the extent of its own powers, unless it has clearly and beyond doubt exceeded the legislative functions with which it is invested by the constitution. This is so generally recognized as true as to be regarded as axiomatic upon all questions as to the power of a legislature to enact a given law.

In considering the question as to the validity of this tax, it is not necessary to affirm that the power exists to levy a tax upon any and every business that is carried on in the state by any of its citizens, without regard to the purpose for which it is laid.

This is an assessment in the form and nature of a tax upon the business of trafficking in intoxicating liquors, carried on by any person in the state; and, is there power in

the general assembly to levy a tax upon *this business*, is the question. We think, without doubt, there is. As observed, it is not material as to what the power should be called. But, we think, it may properly be termed a police power, recognized by the constitution as within the legislative authority, conferred by that instrument upon the general assembly, over the business of trafficking in intoxicating liquors. Whatever limitations may exist upon the power of the general assembly to levy taxes upon vocations in general, the framers seem to have removed any as to this traffic. With the exception of lotteries, which are prohibited, it is the only business of the citizen, that they thought proper, or necessary, to designate as a source of evils; and, in so doing, they specifically empower the general assembly to regulate these evils. No method of accomplishing this is designated, and the power is, therefore, left to be exercised by the general assembly, in its plenitude as the legislature of the people, subject only to such express limitations as are imposed in that instrument. What are they? If any, other than the clause in section 9, article 15 (section 18 of the schedule), it must be that provision of the constitution (section 2, article 12) requiring all taxation upon property to be by a uniform rule according to its true value in money. Other objections as to the existence of the power do not, as we shall presently show, arise out of the terms of the constitution. If this provision applies, it must be because this assessment is a tax on property, and that no other form of taxation is permissible under the constitution. It may be that an exhaustive analysis would show that any tax, whether *per capita*, on occupations, or on the valuation of property is, in fact a tax on property itself. But these distinctions existed when the constitution was adopted, and are well recognized. Cooley's Const. Lim. *496. They are in fact recognized in the constitution. As a possible mode of taxation, a poll-tax is prohibited (section 1, article 12). But if it is a tax on property, why should it be expressly prohibited? If it is such a tax, it is included in the terms of section 2, article 12, and could not be levied without violating

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its requirements. An assessment is also a tax on property, levied according to benefits conferred on the property, and has been recognized as a permissible mode of raising money for the construction of roads and ditches. The general assembly is empowered, by section 6, article 13, to restrict the use of assessments by cities and villages, so as to prevent the abuse of the power. But in *Reeves v. The Treasurer of Wood County*, 8 Ohio St. 333, it was held that assessments are not embraced in the meaning of the word "taxing," as used in the second section of the twelfth article of the constitution, and that the power to authorize them is comprehended in the general grant of legislative power. They had been in use as a well recognized mode of raising money for such purposes before the present constitution was adopted, and were not abrogated by it.

Labor upon the highways is a form of taxation. Burrough's on Tax., section 5. Tolls upon the persons or property, making use of the works of public improvement owned and controlled by the state, are also a species of tax. *Cooley Const. Lim.* *496. Tolls have been constantly levied and collected upon such improvements in the state whilst under its control, and labor upon the highways has been required and performed without question, since, as before, the present constitution was adopted. A tax on occupations was not unknown to the people of the state. They had been imposed and sustained by the supreme court in bank (*State v. Gazlay*, 5 Ohio, 15). In an instrument framed with such care as the constitution of 1851, to limit and define the powers of government, especially that of taxation, would it not be strange that its authors should have been careful to prohibit, in express terms, one of two well-known forms of its exercise, if their intention had been to prohibit both? Such intention can not be inferred from the language used in section 2, article 12, as a poll-tax is as much a tax on property as it is a tax on vocations. But neither is within the meaning of that section; and, if the purpose had been to abrogate the power to levy a tax on the business of the

citizen, we see no reason why it would not have been done by the use of express language, as was done in the case of a poll-tax. It is not intended to decide that the power exists to levy a tax on a business or vocation for any purpose of revenue, independent of other considerations. Such question is not presented in this case. In this country, the adoption of a written constitution by the people of a state is rather to define and limit an existing polity than to introduce a new one; and it is generally understood that any power conferred is, unless enlarged by express language, to be exercised in the customary way and subject to such qualifications as had usually been observed.

Since the adoption of the present constitution a variety of cases have arisen and been decided in this court from which these principles may be deduced:

1. The power of taxation is limited, but not conferred, by section 2, article 12, of the constitution. It is included in the legislative power conferred on the general assembly by section 1, article 2, of that instrument. The limitation is on the power to raise revenue by the taxation of *property*; all other recognized modes of exercising the power may be resorted to by the legislature, whenever in its wisdom it may be deemed necessary. *Baker v. Cincinnati*, 11 Ohio St. 534.

2. Whenever the pursuit of any business is attended with such inconvenience and evils as to make it a source of burden to the general public, beyond what results from the pursuits of men in general, it is competent to the legislature to burden the business, distinguished in this regard, with such taxes as will afford indemnity to the general tax-payer for the increased burden thus imposed on him, and tend to repress the evils connected with the business itself.

The leading case is that of *Baker v. Cincinnati*, *supra*, sustaining a tax that had been levied in the form of a license upon theatrical exhibitions, under an ordinance of the city imposing a tax upon such exhibitions and various other employments, in pursuance of authority conferred by statute.

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The tax imposed was much in excess of the fee charged for issuing the license; and, to the objection raised on this ground, Gholson, J., said:

"The exhibition may require additional attention from those intrusted with the care of the public peace to prevent disorder and disturbance. The burden thus devolved on public officials, requiring, perhaps, an increase in their number or compensation, for the benefit of exhibitors of shows or performances, may justly authorize a charge beyond the mere expense of filling up a blank license. The same principle that would authorize a charge for the one extends to the other. To say that it is a tax and goes into the public treasury does not disprove this object. There is no magic in names."

The same principle has been applied in a number of other cases. *Cincinnati Gaslight and Coke Co. v. The State*, 18 Ohio St. 238; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 534. In *Holst v. Roe*, 39 Ohio St. 340, a tax on the business of keeping a dog was sustained, as a reasonable way of compensating the husbandry of sheep for losses sustained from such business. And in *Frame v. State*, *supra*, the tax on the traffic in intoxicating liquors, imposed by the Scott law, was sustained on the same principle; and in the subsequent case of *Butzman v. Whitbeck*, there was no disapproval of this point.

That in some of these cases the tax was levied in the form of a license does not amount to a difference in principle. In the one case the right to carry on a lawful business is withheld until the tax is paid; in the other it is not. In either case the tax is on the business, and the principle on which it is imposed is the same—indemnity and protection to the public against evils resulting from the nature and character of the business.

In an ingenious brief that has been furnished us by able counsel of the plaintiffs in error, it is asserted, as a proposition, "that whenever the only regulation or restraint connected with the imposition of a burden upon a business or calling consists in the repressive tendency which is the

incident of all taxation, the imposition can not be considered as made under the police powers of the state, but must be regarded as an attempted exercise of the power of taxation." How this can be is not apparent in the statement, nor made so by the reasoning of counsel. If the liquor traffic is a source of evils, and, from the language of section 9, article 15 (schedule section 18), it was certainly regarded as such by the framers of the constitution, then the more the traffic prospers the greater the evils resulting from it will be, and the more it is repressed the less they will be. Nor is it consistent with an admission made *in limine*, "that the state may impose burdens upon certain occupations and employments with a view to the protection of the health of the citizens, or for the preservation of good order, or to secure the safety, convenience, or general welfare of the community."

Term the power conferred in section 9, article 15 (section 18 of the schedule), what you may, and it can not, we think, be denied that, if the imposition of a tax upon the traffic in intoxicating liquors will have a tendency to reduce the evils resulting from the traffic, its imposition must be regarded as a legitimate exercise of the power therein conferred; and, as before stated, the mode of its exercise has been left to the discretion of the general assembly, limited only by such restrictions as have been imposed upon the exercise of its legislative power; for, though it be termed a police power, it is, nevertheless, legislative in character, and is subject to the limitations upon that power, and none other. McIlvaine, J., observes in *Frame v. State*: "The direct tendency of these burdens is to reduce the number of places where such traffic is conducted, and the number of persons engaged in it, and, per consequence, the quantity of liquors drunk." And adds, "that it would be impossible to say that the amount of evil will not be diminished." 39 Ohio St. 411.

A specious argument is made to the effect that if the supremacy claimed for the legislature in the enactment of laws for the regulation of the liquor traffic exists, then it may make the traffic in any form a crime, and punish a

violation without a court or jury. The fallacy consists in assuming that unlimited legislative power is claimed for the general assembly over the traffic. No such claim is made. The claim is, that its power is as unlimited over this subject of legislation as over any other within its province, except that it can not license the traffic. To show that a given limitation does not apply in a particular instance is not a showing that it does not apply in any, nor that there are no limitations on legislative power whatever. Such, however, is the logic of the argument made in this regard.

The traffic being the acknowledged source of much of the crime and pauperism in the state, the appropriation of the funds arising from the tax is in accord with the spirit of the law—part being distributed to the general fund, from which the costs of the state created in the prosecution of crime are paid, and part to the police, and part to the poor fund.

The question of the power of the state to impose and collect special taxes, in the nature of police regulations, will be found treated, with his usual ability and clearness, by Judge Cooley, in his work on Taxation, chap. 19. The fact that, in the interest of sobriety and good morals, he is evidently a zealous advocate of the regulation of the whisky traffic, by a tax imposed on the business, should not, as we think, impair the value of his authority in this regard.

III. The next objection to the validity of this statute is, that the summary methods by which the tax and penalties imposed by it are assessed and collected, deprive the individual of the guaranty contained in the sixteenth section of the bill of rights, that "every person for an injury done him in his lands, goods, etc., shall have remedy by due course of law;" and, for a like reason, violates the clause in the fourteenth amendment of the federal constitution, "nor shall any state deprive any person of life, liberty, or property, without due process of law."

It is apparent, from the terms employed, that the clause incorporated by this amendment in the federal constitu-

tion imposes no limitation upon the legislative power of the general assembly of this state that had not been imposed by its bill of rights. Due course and due process of law are one and the same thing. We do not feel required to enter upon any extended discussion of this important constitutional guaranty. For whatever of doubt there may be in its application to a variety of cases, it is well settled that it does not affect the usual modes that have been long adopted for the assessment and collection of taxes; in other words, these modes are recognized as due process of law. "It has long been settled that while one is to be protected in his interests by the 'law of the land,' he has a right to 'the judgment of his peers' only in those cases in which it has immemorially existed, or in which it has been expressly given by law. The clause recited from Magna Charta does not imply the necessity for judicial action in every case in which the property of the citizen may be taken for the public use. On the contrary, a legislative act for that purpose, when clearly within the limits of legislative authority, is of itself the law of the land. And an act for levying taxes . . . is within the unquestioned and unquestionable power of the legislature. It is, therefore, the law of the land, not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for in order to give the rule full operation. . . . There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct; and if the officers intrusted with the execution of the laws transcend their powers to the injury of an individual, the common law entitles him to redress. But to pursue every delinquent liable to pay taxes through the forms of process and a jury trial, would materially impede, if not wholly obstruct, the collection of the revenue. There is no room for the supposition, that in a matter of this public importance, where promptness in collection is always desirable, and often imperative, dilatory proceedings of this nature were

within the contemplation of the people when consenting to any general provision of the constitution." Cooley on Taxation, 49.

In England arbitrary exactions, without authority of parliament, were a frequent source of public irritation and complaint, and had much to do with the misfortunes of the Stuart dynasty. But in the whole course of English history no case occurs where the validity of a tax in the many and varied forms it was imposed, for the purpose of raising revenue, was called in question on the ground that the manner in which it was authorized to be collected was not due process of law. The subsidies, etc., were generally collected by commissioners (Blackstone's Commentaries, B. 1, ch. 8), and if the methods varied from the manner and form in which taxes are collected in this country, it will not be affirmed that the variance was in favor of the subject, or, had in it more of the levin of "due process of law." Delinquency was not always punished by the extraction of teeth, nor was it awarded the determination of a court and jury. The people of this country, in their colonial and subsequent history, have always collected taxes through the agency of administrative officers. The courts have remained open to those who could show that they had been aggrieved; but, that the state should resort to the courts for the purpose of making collections, or in enforcing penalties for frauds and delinquencies, has not been allowed, and but little insisted on. It will hardly be affirmed that grievances connected with the method of collecting taxes led to the adoption of the fourteenth amendment of the federal constitution; nor has the supreme tribunal of the nation, as yet, manifested any disposition to so construe it. For any excesses in this regard, the individual will most likely find ample protection in the constitution and courts of his own state.

The result of the decisions of the supreme federal tribunal in giving a construction to this amendment, so far as it affects the revenue laws of a state, is summed up by the learned author from whom we have before quoted, in his

work on Taxation, at page 51. By these decisions such laws may be in harmony with that amendment, though they do not provide for giving a party an opportunity to be present when the tax is assessed against him, and to be there heard, if they give him the right to be heard afterward in a suit to enjoin the collection in which both the validity of the tax, and the amount of it, may be contested; and it is immaterial to this question that the party to the suit is required, as in other injunction cases, to give security when instituting the suit. He cites the following: *McMillen v. Anderson*, 95 U. S. 87; *Hagar v. Reclamation District*, 111 U. S. 701; *Davidson v. New Orleans*, 96 U. S. 97, and other cases, which certainly bear out the text of his work.*

This statute contains no unusual or extraordinary provisions for the assessment and collection of the tax. The apportionment is made by the legislature in the first section of the act. This is the province of the legislature. When taxes are thus laid upon a business, ministerial officers have nothing to do but to list the persons engaged in the business and collect the sums which the laws have definitely fixed. *Cooley Taxation*, 238.

Penalties are attached for non-payment, and the assessments, with penalties attached, are to be collected in the same manner as other taxes, and so as to the lien on the real estate where the business is conducted. There is no ground for complaint in these particulars, unless a distinction can be drawn between this and other taxes, as to the manner in which it should be collected. There is none apparent that seems founded in any reason. True, it is not a tax levied for general revenue. It is a special tax levied with a twofold purpose: First, to diminish the traffic in intoxicating liquors as a beverage, and thereby correspondingly reduce the evils resulting from it. Second, to compel the business to contribute a fund wherewith, as a matter of distributive justice, to re-imburse the general tax-payer for the increased burdens imposed on him by the evils incident to the liquor traffic, in which it is distinguished from the

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pursuits of men in general. It is no objection to a tax that it is laid for the double purpose of regulation and revenue. 2 *Desty on Taxation*, 1384. What reason then exists for the assessment and collection of this tax in any form different from that of taxes in general. The same reasons exist in the one case as in the other for a collection in a summary administrative mode.

The most stress is, however, placed upon the clause in section 5, doubling the assessment in case of a refusal of the individual to furnish the requisite information to the assessor to make the required statement, or to sign or verify the same. The argument assumes that this is done without notice to the party. The very contrary is the fact. The refusal must be "on demand." The demand is notice of what must follow a refusal. There is no ground for complaint here, unless obstinacy can be claimed as a right. It is the same in principle as the provision in the general tax law applicable to the case where a party refuses to list his property, or to swear to the return of the assessor; the fact is returned by the assessor and the amount as returned by him is increased fifty per centum by the auditor. Section 2784, Revised Statutes. The power to impose such penalties for false returns was sustained in *Genin v Auditor*, 18 Ohio St. 534. In *Champaign County Bank v. Smith*, 7 Ohio St. 42, the auditor of the county had placed upon the duplicate for taxation certain stocks owned by the bank, without notice to it. The statute required notice, and the court held it could not be dispensed with. Hence this case is no authority for saying that the addition of a penalty for a refusal to sign or verify a return on demand, is not due process of law, and that the clause in the statute authorizing it to be done is invalid.

It is also argued that if the assessor makes a wrongful return, this is made conclusive on the party. There is no warrant in the law for this statement. If the assessor return what is not the fact as to the business of an individual, or if he return that he refused to furnish information, or to sign or verify the statement, when in fact he did neither,

he would not be concluded. The courts would certainly be open for its correction; and if the return was not only wrongfully, but willfully made, the assessor would be liable upon his bond to the party aggrieved. Whether he may or may not be entitled to an appeal to some other administrative officer or board, does not affect the question. An appeal is not a matter of right in judicial, and much less in administrative proceedings. As between an appeal to some other officer, and a suit in a court whose doors are open to him, there is no substantial difference. Due process of law has reference to the procedure in the first instance. Where the party has a chance to be heard before the officer appointed to make the assessment and return, he can not be heard to say that he has been injured in his property, without due process of law, because no mode of appeal is provided.

IV. The objection to the statute, that it is not general and uniform in its operation, is based upon the fact that it does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof by the manufacturer of the same in quantities of one gallon or more at any one time.

All legislation consists, to a greater or less extent, in the creation and definition of categories to which the provisions of a statute are applied by the legislature. Thus, in defining and punishing larceny, a theft of personal property of the value of thirty-five dollars or more is made a felony and punished by imprisonment in the penitentiary, but if the property taken is a cent less than thirty-five dollars it is simply a misdemeanor and very differently punished; yet the essential character of the act punished is much the same in both cases. The majority of males is fixed at the age of twenty-one years and that of females at eighteen. Yet many males at twenty are quite as competent to act for themselves as others are at twenty-five. There is, however, a necessity for a distinction; and the legislature in making it has, in the case of a felonious larceny, done so by drawing the line for a simple misdemeanor, at thirty-five

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dollars in the valuation of the property taken ; and in defining the legal capacity of a male to act as a person *sui juris*, has arbitrarily done so by making it include all male persons of twenty-one years and over. The generality and uniformity of these laws have never been questioned ; and many similar instances might be adduced. The law of 1854, to provide against the evils resulting from the sale of intoxicating liquors, prohibited its sale to be drank upon the premises where sold, but made an exception in favor of beer, ale, cider, and wine manufactured from the pure juice of the grape cultivated in this state, although well known intoxicants ; and the validity of the law was sustained in *Miller v. State*, 3 Ohio St. 475, after every conceivable objection that the ingenuity of able counsel could devise had been made to it.

It was for the legislature to determine the forms of the traffic that required to be regulated as a source of evil. It has in a measure drawn the line between the distillery and the brewery, on the one hand, and the saloon on the other. There is nothing unreal in the distinction. It is known by all men, and in one respect probably too well by many men. And unless absolute prohibition is resorted to, no more practical distinction could be made. The evils that result from the use of intoxicating liquors as a beverage occur at the place where it is sold as such, not where it is manufactured and sold in large quantities. But if the legislature has erred in not including what has been excepted from the operation of the law, it is simply an error of judgment in the exercise of its authority and can not be reviewed by the courts.

It is averred that, from a long time prior to the enactment of this law, the plaintiffs have been engaged in the traffic in intoxicating liquors, and have had a large amount of property invested in the business ; and it is claimed that the law can not be made applicable to them without impairing vested rights. The claim is not tenable. It would subvert the power to provide against the evils of the traffic, and place it superior to any regulation whatever.

The provision of section 9, article 15 (section 18 of the schedule) of the constitution has stood, since its adoption, as a perpetual admonition to all persons engaging in the traffic, that, in doing so, they place their property, invested in the business, subject to the power of the general assembly to provide against evils resulting from the traffic. The same argument was made in *Miller v. State*, *supra*, against the act of 1854 prohibiting, among other things, the sale of liquor to be drunk on the premises where sold; but it met with no favor in the court. The law was held valid. See opinion of Thurman, J., in the case 3 Ohio St. 484-7.

No prescriptive right can be claimed by persons engaged in the whisky traffic against the exercise of its functions by the legislature of the state. It was said by Taney, C. J., in *The License Cases*, 5 How. U. S. 577: "If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

The question whether the tax can be made to attach as a lien on the property in which the business is conducted, as against the owner, where carried on by his lessee and not himself, is not presented in this case. All, on whose behalf it is prosecuted, are engaged in the traffic; and, as we have shown that its provisions do not operate as a license, in any sense of the term, and that the tax may be levied upon the business and made a lien upon the property of those engaged in it, its provisions must be enforced as to the plaintiffs, whether it can be or not as to the property of the lessor not engaged in the business. "In construing statutes, the rule is to enforce them so far as they are constitutionally made, rejecting only those provisions which show an excess of authority by the enacting power." Birchard, J., in *Cincinnati v. Bryson*, 15 Ohio, 645. This is in conformity to a settled maxim of construction, *ut res magis valeat quam pereat*, and the clearly expressed inten-

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tion of the legislature, contained in the statute, that "the abrogation . . . of any section or clause of this act shall not be held to abrogate . . . any other section or clause thereof." § 13 (83 Ohio L. 161). "Every presumption must be taken in favor of the validity of statutes." McIlvaine, J., in *Frame v. State*, *supra*, 416.

The judgment is affirmed, without prejudice to the right of any of the parties to prosecute a separate action for relief against any erroneous or wrongful return that may have been made by the assessor as to his business.

OWEN, C. J., and FOLLETT, J., dissent.

44s	576
44s	577
44s	577
44s	576
47	482
44s	576
49	525
44	576
53	331
44	576
68	644

ANDERSON v. BREWSTER.

Constitutional law—Intoxicating liquors—Lien—License—Act of May 14, 1886—Dow law.

1. Under the second section of the statute of May 14, 1886, known as the Dow law (83 Ohio L. 157), a valid lien is created upon the real property, when the tenant holds under a lease, written or parol, made after the passage of the statute.
2. The assessment imposed by the first section of the statute is not in conflict with the second section of the twelfth article of the constitution.
3. The statute, so far as it provides for an assessment or tax upon the business of trafficking in intoxicating liquors, is not, in effect, a license law, and not within the inhibition of the 18th section of the schedule to the constitution.

ERROR to the Circuit Court of Hamilton county.

The original action was brought on the 7th day of June, 1886, by Mary F. Anderson, plaintiff in error, against Joseph W. Brewster, auditor of Hamilton county, and Frank Ratterman, treasurer of that county, defendants in error. The petition sets forth that the plaintiff, Mary F. Anderson, is the owner of certain premises situated in the

city of Cincinnati, Ohio, which are occupied by one Thomas Tully, as a tenant from month to month, who is engaged in the business of trafficking in spirituous, vinous, malt, and other intoxicating liquors. That said Tully has been engaged in said business in said premises for several months last past, and since January 1, 1886, and is now engaged therein; but has no lease of said premises, and occupies the same as a monthly tenant as aforesaid.

That the said Joseph W. Brewster, as auditor of Hamilton county, has, according to the provisions of an act passed by the general assembly of the state of Ohio, May 14, 1886 (83 Ohio L. 157), entitled "an act providing against the evils resulting from the traffic in intoxicating liquors," caused the business of said Tully to be assessed in the sum of \$200, as provided by section one of said act; and that said assessment so made is, by the provisions of section two of said act, made a lien upon the premises of the plaintiff, in which the business of said Tully is conducted, as of the fourth Monday of May, 1886; but that said assessment is not payable save and except as provided by said section two, one-half of the same on or before the 20th day of June, and one-half on or before the 20th day of December, 1886, and no part of said assessment has been paid.

That said auditor has caused to be made a duplicate containing such assessment, in pursuance of sections five and six of said act, and is about to deliver the same to the said Frank Ratterman, treasurer of said Hamilton county, for the purpose of collecting the same, in pursuance of the terms of said act; and that said Frank Ratterman, treasurer as aforesaid, is about to proceed to collect said assessment, and to enforce the payment of the same, as provided in said act.

That said pretended lien is illegal and void. That said assessment is illegal and void in this, to wit: That said act providing for said assessment and making the same a lien upon the premises of the plaintiff is unconstitutional, in

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that said act is a violation of article 12, section 2, and also of section 18 of the schedule to the constitution of Ohio.

That the acts of said defendant, Joseph W. Brewster, auditor as aforesaid, in making said duplicate, and of the said Frank Ratterman, treasurer as aforesaid, in collecting said assessment, are illegal, and to the damage of the plaintiff, and will produce great and irreparable injury to the plaintiff; and that said illegal assessment operating as a lien on the premises of plaintiff is a cloud on her title.

The plaintiff asks in her petition that said auditor may be perpetually enjoined from placing said assessment on said duplicate against said premises; that said treasurer may be perpetually enjoined from collecting said assessment as a lien on said premises; that said act may be declared null and void; and that said cloud and pretended lien on the property of the plaintiff may be removed.

To this petition a demurrer was filed by the defendants, which the court of common pleas sustained, and dismissed the petition, and rendered judgment in favor of the defendants. An appeal was taken by the plaintiff to the circuit court, which also sustained the demurrer of the defendants, dismissed the petition, and rendered final judgment for the defendants. To reverse the judgment of the circuit court this proceeding is instituted.

Willis M. Kemper, for plaintiff in error.

Rufus B. Smith, Thomas McDougall, and C. B. Matthews, for defendants in error.

DICKMAN, J. The plaintiff in error is the owner of certain premises in the city of Cincinnati, which are occupied by a tenant engaged in the business of trafficking in intoxicating liquors. By virtue of section one of the act passed May 14, 1886, "providing against the evils resulting from the traffic in intoxicating liquors," and known as the Dow law, the tenant's business was assessed in the sum of two hundred dollars, and such assessment, under section two of the act, is made a lien upon the owner's premises.

The lien thus created, it is alleged, has caused a cloud upon the owner's title, to remove which the original action was instituted. The pleadings put in issue the validity of such lien, and give rise to the inquiry, as in *State v. Frame*, 39 Ohio St. 399, whether it contravenes section 19, article 1, of the constitution, which provides that "private property shall ever be held inviolate, but subservient to the public welfare," and also whether the assessment that is made a lien is in conflict with section 2, article 12, of the constitution, and section 18 of the schedule to the constitution of Ohio.

It is provided by the first and second sections of the act of May 14, as follows:

"Section 1. That upon the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors, there shall be assessed, yearly, and shall be paid into the county treasury, as hereinafter provided, by every person, corporation, or copartnership engaged therein, and for each place where such business is carried on by or for such person, corporation, or copartnership, the sum of two hundred dollars; provided, if such business continues through the year, to wit, from the fourth Monday of May, exclusively, in the trafficking in malt or vinous liquors, or both, such assessment shall be but one hundred dollars.

"Section 2. That said assessment, together with any increase thereof, as penalty thereon, shall attach and operate as a lien upon the real property on and in which such business is conducted, as of the fourth Monday of May each year, and shall be paid at the times provided for by law for the payment of taxes on real or personal property within this state, to wit, one-half on or before the twentieth day of June, and one-half on or before the twentieth day of December, of each year."

It is presumed that the legislature designed these sections to be prospective in their operation, so as not to impair existing rights. The settled rule is, that whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, such construction will be adopted by the courts. *Newland*

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v. *Marsh*, 19 Ill. 384; *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478. In determining whether the assessment in question would operate as a valid lien upon the owner's premises, it is material to inquire as to the conditions under which the tenant is in possession. If the real property on or in which the business is conducted is held by the tenant under a lease for a term made prior to the passage of the statute, the provisions for a lien in the second section would not operate. It might well be considered an unauthorized interference with private property, and contrary to the legislative intent, to subject the freehold of a lessor for assessments against the business of a lessee, over which the lessor could exercise no control during the term granted under a pre-existing lease. *State v. Frame, supra*. But, in the case at bar, the occupant had no written lease, and occupied the premises only as a monthly tenant. After the passage of the statute, and before the commencement of the original action, his term had expired and he had become a tenant at sufferance. At common law, he had only a naked possession, and no estate which he could transfer or transmit, or which was capable of enlargement by release, nor was he entitled to notice to quit. He held by the laches of the landlord, who might enter and put an end to the tenancy when he pleased. 2 Black's Com. 150; Co. Litt. 270b; *Jackson v. Parkhurst*, 5 John. 128; *Jackson v. M'Leod*, 12 John. 182. Holding over, as the tenant did, after the month of May, the plaintiff in error could have resorted, at her option, to the statutory remedy of forcible entry and detainer. She was not, therefore, in the position of a lessor, whose premises are placed beyond his control, by a lease executed before the passage of the statute, but she had it in her power to terminate the tenancy, and thus prevent the assessment from becoming a charge upon her property. If she elected to allow her tenant to hold over after his interest was determined, and to permit the relation of landlord and tenant to be renewed, and the premises were thereafter used by the tenant in the business of trafficking in intoxicating liquors, it would be presumed that she so

acted in full view of the statutory lien that would thereby be fastened upon the premises.

But it is contended that if it should be granted that the assessment upon the tenant's business is not inhibited by the constitution, the lien created for the purpose of enforcing its payment is in violation of the constitution, and an unwarrantable invasion of private property, inasmuch as it is in effect subjecting the property of one man to discharge the obligations of another. Section 19, article 1, of the constitution is designed to guard the inviolability of private property subservient to the public welfare. But, as said by Thurman, J., in *Cass v. Dillon*, 2 Ohio St. 624, that section has no reference to the taxing power; its object is rather to prescribe modes for and limitations upon the exercise of the power of eminent domain. It does not, therefore, embrace within its operation sections one and two of the statute under consideration, which may be referred to that branch of the sovereign power of the state denominated the taxing power. This power, it has been said, in its nature acknowledges no boundary. It is inherent in sovereignty, and is coextensive with that of which it is an essential property. It is necessary to the existence of government, and being granted for the benefit of the whole people, none have any right to complain, if the power is fairly exercised, and the proceeds properly applied to discharge the obligations for which the taxes are imposed. *Cooley on Taxation*, 3; *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 60. The principle is stated with great force by Chief Justice Marshall, in *M'Culloch v. Maryland*, 4 Wheat. 428: "The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government the right of taxing themselves . . . and as the exigencies of government can not be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influ-

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ence of the constituents over their representative to guard them against its abuse." The power of taxation, however, included in the legislative power vested in the general assembly by article 2, section 1, of the constitution, is indeed wisely regulated and limited by that instrument; but, we may well ask, what avails the power of taxation, if there is no commensurate power to collect taxes and assessments when imposed. It is not, therefore, we think, beyond the scope of the legislative authority of the state to enact that the payment of a tax on the business of the liquor traffic shall be secured by a lien on the premises upon which the business is carried on, if the owner of the premises after the passage of the law, leases and identifies them with the business, and makes them participant therein, and for the time being necessary to its continuance.

A statute of the state of Michigan provides that if any person shall neglect to pay the tax imposed upon him, the treasurer shall levy the same by distress and sale of any goods and chattels in the possession of such person, and no claim of property made thereto, by any other person, shall be available to prevent a sale. And when any property shall be legally distrained and sold for the tax of any person, and such property shall be owned by another person, such owner is authorized to recover of the person for whose tax the same was sold the value of such property in an action of assumpsit. In *Sears v. Cottrell*, 5 Mich. 251, it was insisted that this statute was on several grounds in violation of the constitution, and especially on the ground that the owner was deprived of his property "without due process of law." But the words, "due process of law," it was said, meant the law of the land; and by "the law of the land," under the right of taxation, was to be understood laws that are general in their operation, and that affect the rights of all alike. The law in question was declared to be constitutional; and it was held to be of general operation, and not a special act of the legislature passed to affect the rights of an individual in a way in which the same rights of other persons were not affected. If it

should be said that the law might prove unnecessarily severe, and might sometimes do injustice, without fault in the sufferer, it might well be replied, said the court, that such considerations might very properly be addressed to the legislature, but not to the judiciary; they go to the expediency of the law, and not to its constitutionality. Mr. Justice Christiancy, in a concurring opinion, considered at length the specific objection that the law was unconstitutional, in that it authorized the taking of one man's property for the debt of another. But that particular provision of the law was pronounced to be not a new one as applied to the collection of taxes, and to be much older than the constitution. It has prevailed for a long period in the state of New York, and its constitutionality seems never to have been questioned in that state. See *Sheldon v. Van Buskirk*, 2 N. Y. 473. The same principle holds in the state of Vermont, and where a constable has failed to make return, and pay over taxes, the sheriff, on an extent, if unable to find property of the constable, "may levy and collect the same of any inhabitant of the township," who is to have his action against the township for the amount.

But the general assembly, under section 18 of the schedule to the constitution, as one of the means of providing against the evils resulting from the traffic in intoxicating liquors; has deemed it proper to assess the business of those engaged in such traffic, and to provide that the assessment shall operate as a lien upon the real property on and in which such business is conducted. Invoking the aid of the taxing power, if we regard these provisions of the statute as also an exercise of the police power of the state, there was, in our judgment, ample authority to create a lien on the premises of the plaintiff in error for the payment of the assessment on the tenant's business. If a tenant engages in a business which, by causing intemperance, pauperism, and crime, becomes a proper subject for the exertion of the police power of the state, the legislature may with propriety include the premises of the

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lessor, which sustain and derive profit and advantage from the subject-matter upon which such power is exerted. "It is a settled principle," says Chief Justice Shaw, "growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the . . . rights of the community." *Commonwealth v. Alger*, 7 Cush. 84. For over thirty years it has been the settled policy of this state to hold any building or premises, rented or leased to another, to be used or occupied for the sale of intoxicating liquors, contrary to law, liable for all damages assessed against the lessee thereof, for violations of the laws regulating such traffic. S. & C. 1434. Such liability is continued in section 4364 of the Revised Statutes, and the premises may be sold to pay all fines, costs, and damages assessed against any person occupying the same. This species of legislation, involving in liability both lessor and lessee for damages resulting from the business of the latter to third persons, has frequently come under judicial examination, without its constitutionality being seriously called into question, and may find cumulative sanction in the well recognized police power granted to the general assembly in the schedule to the constitution. *Zink v. Grant*, 25 Ohio St. 352; *Justice v. Lowe*, 26 Ohio St. 372; *Bowers v. Pomeroy*, 21 Ohio St. 184; *Schultz v. The State*, 32 Ohio St. 276.

The existence of the lien under consideration need not work to the detriment of the owner of real property. If he leases property adapted to the business contemplated in the statute, he may stipulate with his lessee for an indemnity against any loss accruing to him from the statutory lien. He is presumed to take cognizance of the general laws of the state that are in force. And if, with eyes open, he provides a building or premises for another to conduct a business marked by the constitution and laws as a source of evil, and opposed to public policy, he should not be permitted to evade the operation of the

statute. If the alienation of the real estate becomes less feasible on account of the statutory lien, the owner who has executed a lease after the passage of the statute has himself invited the lien.

The able and learned opinion pronounced by Minshall, J., in *Adler v. Whitbeck*, ante, p. 539, renders it unnecessary to consider at any length the direct bearing of section 2, article 12, of the constitution, on the assessment upon the business of trafficking in intoxicating liquors, which is made to operate as a lien upon the real property. It is well understood that this section is not a grant of power, but a regulation or limitation rather, of the taxing power comprised in the general legislative power of the state vested in the general assembly. While, however, it furnishes the governing principle for taxes for general revenue, by providing that laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money, it does not cover the whole domain of taxation. In the taxation of property for general revenue, equality and uniformity must constitute the guiding rule, but it was not intended to so impair the ability of the legislature to promote the public good as to preclude it from all modes of raising money by taxation or assessment, not in strict conformity with the second section of the twelfth article. In raising general revenue to meet the necessities of government, certain designated kinds of property are required to be taxed by a certain rule; but, subject to the limitations contained in the constitution, the power to impose taxes reaches to trades or occupations, in any of the modes known and practiced prior to the constitution of 1851. *Cooley on Constitutional Limitations*. * 479; *Western Union Telegraph Co. v. Mayer*, 28 Ohio St. 521.

Accordingly, the general assembly, while observing the required rule of uniformity in taxing the kinds of property designated, has frequently, by virtue of the general legislative power granted it by the constitution, exercised a

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supervisory power over various branches of business, and imposed upon them assessments for exceptional and special purposes. Among other examples of this which might be adduced is the assessment upon the business of gas companies and manufacturers of mineral or petroleum oil. In *The Cincinnati Gas L. & C. Co. v. The State*, 18 Ohio St. 237, it was held that a *pro rata* assessment, according to valuation, on the property of the gas companies of the state, to pay the salary of the state inspector and other expenses of his office, was not in violation of the constitutional provision for taxing property according to a uniform rule. Acting upon this principle, the legislature has authorized the state inspector of oils to demand and receive from the owner or party for whom he performs the inspection a certain sum for every package or cask, and all fees so accruing are made a lien on the oil inspected. Indeed, a denial to the general assembly of the right to impose an assessment as prescribed in the Dow law would be inconsistent with the raising of moneys from licenses of any kind, inspection charges, or other kindred methods.

But, not only had the general assembly authority to make this assessment upon the liquor traffic, as being invested with all the legislative powers of the state, but by the schedule to the constitution it is permitted and in duty bound, we think, to use any or all of these powers, not expressly or by necessary implication prohibited, in providing against the evils resulting from such traffic. And if, in the exercise of its judgment and discretion, the legislature sees fit to impose a burden on the traffic in the shape of a tax, for the purpose of diminishing those evils, it does not come within the province of this court to review its action in selecting such means.

There is another branch of this case which seems so free from doubt, that there would be no call for its consideration were it not that it finds a place among the issues set forth in the record. We refer to the contention, that the lien is illegal, because the assessment on the business of the liquor traffic is in violation of section 18 of the schedule

to the constitution, which provides that "no license to traffic in intoxicating liquors shall hereafter be granted in this state." The act of April 5, 1882, known as the Pond law, was declared by a majority of the court, in *State v. Hipp*, 38 Ohio St. 199, to be, in its operation and effect, a license within the inhibition of the constitution, so far as it required every person engaged in the traffic in intoxicating liquors to pay a specified sum of money annually, and execute a bond, with the further requirement that the person who engaged in such traffic without having executed the bond, or after his bond was adjudged forfeited, should be deemed guilty of a misdemeanor. And the act of April 17, 1883, commonly called the Scott law, was also held by a majority of the court, in *Butzman v. Whitbeck*, 42 Ohio St. 223, to be in effect a license law, so far as it enacted that whoever should engage or continue in such traffic upon land or premises not owned by him, without the written consent of the owner thereof, should be held guilty of a misdemeanor, and liable to be punished by fine or imprisonment or both, at the discretion of the court. Neither of these characteristic features of the two preceding statutes is embodied in the Dow law, and, so far as yet discovered, it went from the legislature with none of the objectionable features of a license.

A license in law may be simply and well defined as a permission, but it is a permission given by some competent authority to do an act which, without the permission, would not be legal. Bouvier's Law Dict.; *Youngblood v. Sexton*, 32 Mich. 406. The Dow law does not hold out permission to engage in the traffic in intoxicating liquors, nor stamp it with illegality, nor prescribe a condition precedent upon which one may have the right to carry on such business. It repeals that portion of section 6941 of the Revised Statutes which forbids the sale of intoxicating liquors to be drank in or upon the building or premises where sold; and if one chooses to engage in the traffic, he must do so subject to the burden which is *afterward* imposed upon his business. If he fails to pay the assessment thereon, his

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business does not thereby become illegal, and although his goods and chattels may by his default become liable to be levied on and sold, the property of dealers in other commodities is also liable to be seized and sold for non-payment of personal taxes. He enters upon the traffic in intoxicating liquors, without a license, and when found in the business the law suffers it to continue, but charged with the burden of a tax.

The distinction is clearly recognized, between a license granted or required as a condition precedent before a certain thing can be done, and a tax assessed on a business which one is authorized to engage in. *The Home Insurance Co. v. Augusta*, 50 Ga. 530. A license being of the nature of a privilege, it would be a strange incongruity to grant to one the privilege of bearing the burden of a tax. A tax which may be resorted to for the purpose of restraining what is opposed to the public interests, would hardly be called a license to do that which is sought to be restrained. The two things are entirely distinct in their characteristics. The license may exist without the imposition of a tax, and the tax may be imposed without the granting of a license.

In the constitution of Michigan, it is provided by section 47, article 4—almost identically as in our own—that “the legislature shall not pass any act authorizing the grant of license for the sale of ardent spirits or other intoxicating liquors.” How far a tax on the business might be regarded as a license, and so an infringement of this provision of the constitution, came under the examination of that eminent jurist, Mr. Justice Cooley, in *Youngblood v. Sexton*, *supra*. The whole field of legal thought and investigation on the subject was covered by that leading case, and its reasonings and conclusions commend themselves to the enlightened judgment of every court. The language approvingly cited in *The State v. Hipp*, *supra*, we here adopt. “The object of a license,” says Mr. Justice Manning, “is to confer a right that does not exist without a license. *Chilvers v. People*, 11 Mich. 43, 49. Within this

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definition, a mere tax upon the traffic can not be a license of the traffic, unless the tax confers some right to carry on the traffic which otherwise would not have existed. We do not understand that such is the case here. The very act which imposed this tax repealed the previous law, which forbade the traffic and declared it illegal. The trade then became lawful, whether taxed or not; and this law, in imposing the tax, did not declare the trade illegal in case the tax was not paid. So far as we can perceive, a failure to pay the tax no more renders the trade illegal than would a like failure of a farmer to pay the tax on his farm render its cultivation illegal. The state has imposed the tax in each case, and made such provision as has been deemed needful to insure its payment; but it has not seen fit to make the failure to pay a forfeiture of the right to pursue the calling. If the tax is paid, the traffic is lawful; but if not paid, the traffic is equally lawful. There is consequently nothing in the case that appears to be in the nature of a license. The state has provided for the taxation of a business which was found in existence, and the carrying on of which it no longer prohibits; and that is all." We can add nothing to these words, and we deem it unnecessary to offer any further considerations upon this branch of the case before us. The judgment of the circuit court, we are of opinion, should be affirmed.

Judgment accordingly.

OWEN, C. J., and FOLLETT, J., dissent.

44	589
51	127
41	589
50	207

THE STATE *ex rel.* ATTORNEY-GENERAL v. BREWSTER.

Office and officer—Extension of term by legislature—Sections 8, 1017, Revised Statutes.

1. Where the term of an office is fixed and limited by the constitution, there is no power in the general assembly to extend the term or tenure of such office beyond the time so limited.
2. At the October election of 1883 Brewster was elected auditor of Hamil-

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ton county for the term of three years, commencing on the second Monday of November next after his election. At the November election of 1886, Raine was elected auditor (pursuant to an amended provision of the constitution and section of the statute changing the time of elections) for a term of three years, beginning on the second Monday of September next after the election. The constitution provided, both before and after such amendment, that county officers should be elected for such term, *not exceeding three years*, as may be provided by law. *Held*, 1. At the expiration of Brewster's term of office, to wit, on the second Monday of November, 1886, there was a vacancy in such office. 2. Section 8, Revised Statutes, which provides that "any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless it is otherwise provided in the constitution or laws," did not have the effect to continue Brewster in office beyond his term of three years. 3. Section 1017, Revised Statutes, which provides that "when a vacancy happens in the office on county auditor from any cause, the commissioners of the county shall appoint some suitable person, resident of the county, to fill the vacancy," authorized the commissioners to fill the vacancy so created, and their appointee, having duly qualified, is entitled to fill such office until the commencement of Raine's term of office—on the second Monday of September 1887; and the fact that Raine is such appointee does not constitute such appointment an extension of his term of office beyond three years. 4. The approval of the board of control of Hamilton county was not necessary to give vitality to such appointment.

QUO WARRANTO.

J. A. Kohler, attorney-general, *Rufus B. Smith* and *Wm. H. Taft*, county solicitors, and *J. M. McGillivray*, for plaintiff.
M. F. Wilson, for defendant.

OWEN, C. J. I. The defendant was elected auditor of Hamilton county on the second Tuesday of October, 1883, for the term of three years, beginning on the second Monday of November, 1883, and to expire on the second Monday of November, 1886.

The election was held under article 10, section 2 of the constitution, which ordained that "county officers shall be elected on the second Tuesday of October, until otherwise directed by law, by the qualified electors of each county, in such manner and for such terms, *not exceeding three years*, as may be provided by law," and section 1013 of the Revised Statutes, which provided that "a county auditor shall be

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elected triennially, in each county, at the fall election, who shall hold his office for three years from the second Monday of November next after his election."

At the October election of 1885, the above provision of the constitution was so amended as to read: "County officers shall be elected on the *first Tuesday after the first Monday in November* by the electors of each county in such manner and for such term, *not exceeding three years*, as may be provided by law."

On May 18, 1886, section 1013, Revised Statutes, was so amended as to read: "The county auditor shall be chosen triennially in each county, who shall hold his office for three years, commencing on the *second Monday in September next after his election*."

Under these provisions, as amended, Fred Raine was, at the November election of 1886, elected auditor of Hamilton county for a term of three years, to begin on the second Monday of September, 1887, thus leaving a period of ten months between the expiration of Brewster's term and the commencement of Raine's.

On the 10th day of November, 1886, the commissioners of Hamilton county, acting under the supposed authority of section 1017 of the Revised Statutes, which provides that "when a vacancy happens in the office of county auditor, from any cause, the commissioners of the county shall appoint some suitable person, resident of the county, to fill such vacancy," appointed Raine county auditor to fill such vacancy. He has qualified, given bond, and claims the right to hold the office.

Brewster claims the right to hold the office until the beginning of Raine's term—second Monday of September, 1887—under section 8 of the Revised Statutes, which provides that "any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless it is otherwise provided in the constitution or laws."

The present proceeding is prosecuted to oust Brewster

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from, and induct Raine into, the auditorship of Hamilton county.

The counsel for the parties to this controversy are in full accord upon three propositions: 1. That the term of office of Brewster was limited by the constitution to three years. 2. That it was not competent for the general assembly to extend his term beyond that limit. 3. That upon the expiration of his term—second Monday of November, 1886—there was a vacancy in the office. When we shall have determined how this vacancy may lawfully be filled, the controversy before us will be solved.

Article 2, section 27, of the constitution ordains that “the election and appointment of all officers, and the filling of all vacancies not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law.”

To effectuate this provision, so far as it relates to auditors, the general assembly, as we have seen, has enacted (section 1017, *supra*) that the commissioners of the county shall appoint some suitable person, resident of the county, to fill a vacancy in the office of auditor.

Raine asserts his claim to the office held by Brewster by virtue of the appointment made in pursuance of this provision. Brewster's claim is based upon the assumption that section 8 of the Revised Statutes, cited *supra*, was enacted to provide for filling such vacancies as existed in the case before us; and that if there is any conflict between this and section 1017, *supra*, the latter must yield to the former, which works a repeal by implication of section 8, being a later enactment.

The assumption of counsel, that there is no power in the general assembly to extend the term of an office which is limited by the constitution, is abundantly warranted by the case of *State v. Howe*, 25 Ohio St. 588, where it is said by McIlvaine, C. J.: “After a careful examination of the question, in the light of both principle and authority, we are led to the conclusion that the general assembly may provide against the occurrence of vacancies by authorizing

incumbents to hold over their terms in cases where the duration of their tenures is not fixed and limited by the constitution." Also, "in cases where the duration of the tenure of office is limited by the constitution, of course its duration can not be extended by statute."

If the provision of section 8, that any person holding an office shall continue therein until his successor is elected or appointed and qualified, is to be given the effect contended for, it is not easy to see why this is not an extension of the duration of the office by statute beyond the limitation prescribed by the constitution.

Section 8 is as much a general law as that providing for the election of auditors for three years, and if the two, construed together, are to be held to authorize a holding over after the expiration of the term of three years, what stands in the way of enacting them in one section instead of two? And what would be said of an enactment which, in the face of this plain constitutional limitation of three years, should provide that "county auditors shall hold their offices for three years, and until their successors shall be elected and qualified?" Would anybody seriously contend that such legislation would be constitutionally valid?

It is certainly by a confused process of reasoning that it is contended that the same provision (section 8), which authorizes a holding over beyond the term and thus extends the duration of the office, is also a provision for filling a vacancy. If we give it the effect contended for, there is no "vacancy" to fill. The incumbent is rightfully in office and destined to remain there of right until the beginning of the term of his successor by election.

"That the framers of the constitution, in providing for filling vacancies in office, did not regard an office as vacant, when an incumbent might lawfully hold over his definite term until a successor was elected or appointed and qualified, is manifest from other provisions in the instrument." *State v. Howe*, 25 Ohio St. 596, per McIlvaine, C. J.

Then it should be borne in mind that the provision of

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section 8 that an officer shall continue in his office until his successor is elected or appointed and qualified is subject to the qualification "unless it is otherwise provided in the constitution or laws." We find it "otherwise provided" in the constitutional limitation of the term of this office to three years; and "otherwise provided" by the law which authorizes the county commissioners to fill the vacancy in the auditor's office by appointment. Section 1017.

We can not not, without violence to its language, hold this latter provision to have been repealed by any rational implication from section 8, and the legislative intention that the former section (1017) should point out the mode of filling such vacancy as existed in the present case seems too clear for serious controversy.

II. It is further maintained that the approval of the board of control of Hamilton county was necessary to give vitality to the order of appointment of the commissioners. We are unanimously of the opinion that this position is untenable.

The views above expressed lead us to the conclusion that :

1. The term of office of Brewster having been fixed and limited by the constitution, there is no power in the general assembly to extend his term or tenure of office beyond the time so limited.

2. Section 8, Revised Statutes, does not have the effect to continue Brewster in office beyond his term of three years.

3. Section 1017, Revised Statutes, authorized the county commissioners to fill the vacancy so created, and their appointee, having duly qualified, is entitled to fill the office until the commencement of Raine's term of office—the second Monday of September, 1887.

4. The concurrence of the board of control of Hamilton county was not necessary to give vitality to such appointment.

Judgment of ouster and induction.

FOLLETT, J., dissents.

CASES
'ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO.

JANUARY TERM, 1887.

HON. SELWYN N. OWEN, CHIEF JUSTICE.		
HON. MARTIN D. FOLLETT,	}	<i>Judges.</i>
HON. FRANKLIN J. DICKMAN,		
HON. WILLIAM T. SPEAR,		
HON. THAD. A. MINSHALL.		

ELIAS CLARK *et al* v. BOARD OF EDUCATION, STARR TOWNSHIP.

School and school districts—Taxes—Validity of act of April 16, 1874.

ERROR to the Circuit Court of Hocking county.

S. H. Bright, for plaintiffs in error.

Weldy & Price, for defendant in error.

BY THE COURT. The suit below was brought by the plaintiffs in error, residents of Green township, Hocking county, to restrain the collection of a tax levied upon their property for school purposes in the joint subdistrict created by an act of the general assembly passed April 16, 1874 (71 Ohio L. 187.) The district is composed of a part of the territory of Green and a part of that of Starr township, in said

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county; the parts being contiguous to each other. The relief is sought on the ground that the law is one of a general nature, and not uniform in its operation throughout the state. The *State v. Powers*, 38 Ohio St. 54, is relied on. The district was organized under the law shortly after its enactment; and there is no showing that the plaintiffs have not been, and are not now, availing themselves of the benefits of the school by sending their children to it. Without deciding whether the law is, or is not, open to the constitutional objection urged, we think it is now too late to question its validity by a suit to restrain the collection of a tax levied for the maintenance of the school. *People v. Maynard*, 15 Mich. 463; *Chestnut v. Shane*, 16 Ohio 607.

Judgment affirmed.

ROBERTS v. BRISCOE.

Evidence of transactions with decedent.

In an action by the indorsee of a promissory note against the maker, the executor of the maker may compel the payee and assignor of the note to testify to facts that occurred prior to the death of the testator.

ERROR to the Circuit Court of Greene county.

E. H. Munger and *John A. McMahon*, for plaintiff in error.

T. E. Scroggy and *Little & Shearer*, for defendant in error.

DICKMAN, J. On the 3d day September, 1880, M. W. Roberts executed and delivered to one Jennie Mansfield his two promissory notes of that date, for the sum of \$3,500 each, made payable to Jennie Mansfield or order, one in twelve and the other in eighteen months after date, with interest. Before the maturity of either of the notes,

Jennie Mansfield indorsed and delivered the same to one M. Mouch, who, on the 27th day of March, 1881, indorsed and delivered them to one Jerome Rowley, who, afterward, on the 23d day of July, 1881, indorsed and delivered them, without recourse, to John B. Briscoe, the defendant in error. Upon non-payment of the notes when due, Briscoe commenced an action thereon against M. W. Roberts, in the court of common pleas of Greene county. The defendant answered, and among other things, alleged in substance that if his signatures to the notes were genuine, they were procured by fraud, and were without any consideration, and that the notes were fraudulently written over his signatures without knowledge or consent on his part; that each of the indorsees had notice of such fraud and want of consideration before, and at the time, the indorsements and transfers were made to them respectively; that the notes were not indorsed and delivered by Jennie Mansfield to Mouch, or by Mouch to Rowley, or by Rowley to Briscoe, nor were the same received by Briscoe, or by any of the indorsees, in good faith or for valuable consideration, or with any intent or understanding on the part of any of them, or of Jennie Mansfield, that any ownership or interest therein should thereby be transferred; but that the indorsements were only for the use and benefit of Jennie Mansfield, and for the purpose of enabling her to avoid any defense to an action upon the notes.

M. W. Roberts having died, the action was revived against Emmazetta Roberts, his executrix, and plaintiff in error. A reply was thereafter filed, and the case was tried to a jury. During the progress of the trial, Jennie Mansfield was called as a witness in behalf of the defendant, but her testimony was excluded, and a bill of exceptions was thereupon taken by the defendant. This bill of exceptions states that the plaintiff having offered testimony tending to prove that M. W. Roberts had signed and delivered the notes in suit, and the indorsements thereon, and having rested his case, the defendant offered as a witness Jennie Mansfield, and proposed to prove by her that she was the

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Jennie Mansfield to whom the notes were executed, and that the notes were without any consideration of any kind; that when M. W. Roberts signed the notes, he was not aware that he was signing promissory notes, and did not intend to sign a promissory note, and on signing the paper he believed he was signing a letter for her, nothing being then written above; that the defendant also expected to prove by her the date of the transfer to Mouch and to Rowley, the circumstances surrounding the same, and that neither Rowley nor Mouch were holders for value or in good faith; also to prove by her that neither Mouch nor Rowley had ever paid to her any consideration whatever; that defendant also offered her as a witness generally to all the issues of the case prior to the death of M. W. Roberts, who died July, 1883, as is agreed by counsel. Whereupon the plaintiff objected to Jennie Mansfield as a witness, in so far as any transaction or fact prior to the death of M. W. Roberts was concerned, which objection was sustained by the court, and Jennie Mansfield was excluded as a witness as to all facts and circumstances occurring prior to the death of M. W. Roberts; to all of which the defendant excepted.

During the trial, a second bill of exceptions was taken by the defendant, because of the court's refusal to admit in evidence, when offered by the defendant, two certain letters from Jerome Rowley to Jennie Mansfield, dated respectively March 23, 1881 and March 28, 1881. A third bill of exceptions was also taken by the defendant, upon the exclusion by the court, when offered in evidence by the defendant, of the entries on the appearance docket, in an injunction suit, *M. W. Roberts v. Jennie Mansfield et al.*, in the court of common pleas of Greene county. The jury returned a verdict for the plaintiff. A motion for a new trial was made by the defendant, and overruled. Judgment was entered on the verdict, and the circuit court affirmed the judgment. The plaintiff in error seeks a reversal of the judgments of the courts below.

Upon an examination of the record, we are satisfied

there was no error in the action of the court in rejecting, when offered in evidence, the letters of Rowley to Jennie Mansfield, and the docket entries in the injunction suit. The questions to which such action of the court gave rise have been properly determined, and we deem it unnecessary to consider them here; and were no other errors assigned save those predicated upon the second and third bills of exception, the judgments in favor of the defendant in error should be affirmed. But we think the court erred in rejecting the testimony of Jennie Mansfield. The question here presented is whether the executrix, who is defendant in an action on a claim against her testator's estate, may compel the assignor of the claim to testify as any other witness might be thus compelled, although the assignor would not, if a party, be permitted to testify. Jennie Mansfield, the payee and indorser of the notes executed by the testator, was called as a witness generally to all the issues of the case prior to the testator's death; and it is contended that, as the statute provides that among those who shall not testify is a person who assigns his claim concerning any matter in respect to which he would not, if a party, be permitted to testify; and that, as she would not have been permitted to testify, if a party, in reference to the issues, because the adverse party was an executrix, she was therefore an incompetent witness, and was properly rejected. The parts of the Revised Statutes determining the competency of witnesses and evidence, which bear directly upon the question under consideration, are sections 5240, 5241, 5242, and 5243. Those sections provide as follows:

"Sec. 5240. All persons are competent witnesses, except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

"Sec. 5241. The following persons shall not testify in certain respects: . . . fourth, a person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify.

"Sec. 5242. A party shall not testify where the adverse party . . . is an executor or administrator, . . . except, first, to facts which occurred subsequent to the . . . time the decedent . . . or testator died.

"Sec. 5243. A party may compel the adverse party to testify orally, or by deposition, as any other witness may be thus compelled."

When we consider the enlightened progress made through the code in relaxing the rigid rules as to the competency of witnesses, we can not but be impressed with its liberal spirit, and inclined, in order that justice may not fail, to apply to it such canons of interpretation as will, when not plainly violating the legislative intent, favor the admission rather than the exclusion of testimony. The sections of the Revised Statutes above cited, when examined in their component divisions, will be found to contain no incongruities which may not be reconciled with the general intent of the whole, to wit: that while certain persons shall be incompetent to testify in certain respects, the opposite parties to an action shall be placed as far as practicable upon a basis of equality as to the admissibility or exclusion of evidence. The sections under consideration are *in pari materia*. They are sections of a revised code upon one subject, and are to be construed as a single statute; and treated as a single statute, it is to be so construed that all its provisions may be harmonized if possible. *Mobile and Ohio R. Co. v. Malone*, 46 Ala. 391; *Commonwealth v. Conyngham*, 66 Pa. St. 99; *Davey v. The Burlington, etc., R. R.*, 31 Iowa 553; *Scott v. The State*, 22 Ark. 369.

As said by Okey, J., in *Cochran v. Almack*, 39 Ohio St. 318: "Nobody is excluded as a witness under either section 5241 or section 5242 of the Revised Statutes; but under those sections various limitations and restrictions are placed on testimony." Under section 5241, certain persons "shall not testify *in certain respects*;" and under section 5242, "a party shall not testify . . . except," etc. An attorney, under section 5241, shall not testify concerning a communication made to him by his client in that

relation; but the client may give his express consent, and the attorney may then testify. Husband and wife, under the same section, as against public policy, though not expressed in the statute, shall not testify concerning any communication made by one to the other during coverture; but the prohibition is not absolute, without qualification, for either may testify if the communication is made in the known presence or hearing of a third person competent to be a witness. So the provision under the same section, that "a person shall not testify who assigns his claim or interest concerning any matter in respect to which he would not, if a party, be permitted to testify," is not a prohibition without qualification. Although the assignor of the claim might not, if a party, be permitted or be competent to testify in his own behalf, for the reason that the adverse party is an executor, yet his exclusion is, we think, qualified by section 5243, which would authorize the executor to compel him to testify, as any other witness might be thus compelled. This section is not to be regarded as isolated—having no connection with the three preceding sections of the Revised Statutes, but must be construed according to the rule of statutory interpretation, that general words at the end of a statute refer to and qualify the whole. *Coxson v. Doland*, 2 Daly, 66; *Sedgwick on Stat. and Const. Law*, (2d ed.) 226, n. The language of the section is comprehensive, with no words to indicate that it is limited by any antecedent part of the statute.

The statute having forbidden a party to testify, where the adverse party is an executor, as to facts that occurred prior to the death of the testator, it is justly provided that he shall not remove this disqualification by assigning his claim and constituting another a party to an action in his stead. But while he can not render himself competent as a witness by thus assigning his claim, he should not, by such an assignment, be permitted to deprive the executor of his right, as a party, to compel him to testify as he might any other witness.

The purpose and policy of the law in preventing a party

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from testifying, where the adverse party is an executor or administrator, is to guard the estates of decedents against the setting up of fraudulent defenses, and the establishment against them of fraudulent claims, or unfounded causes of action. *Dudley v. Steele*, 71 Ala. 426. Besides, when one of the parties to a contract can not give his version of it, the other party thereto should not be admitted to testify in his own favor. Where there is no mutuality there should not be admissibility; and when the lips of one party to a contract are closed by death the other party should not be heard as a witness. Wharton on Ev., § 466. But what is intended for the benefit and protection of the estate should not be permitted to operate as a source of injury. The interest of an estate may urgently require that an executor or administrator should waive what belongs to him as a privilege, and call the opposite party as a witness. The facts upon which he founds his defense, or upon which he bases his claim, may be locked up in the breast of the adverse party, and without his testimony a failure of justice may ensue. The legislature could not have designed to place the estates of deceased persons at such disadvantage by depriving them of evidence, within reach, necessary to their protection against imposition and fraud. The adverse and surviving party, when compelled to testify by the executor or administrator, can not reasonably complain; for, though a party, he can then be examined fully in his own behalf on the subject of his examination in chief. *Niccolls v. Esterly*, 16 Kan. 32; Wharton on Ev., § 475a.

That it is not the design of the statute to place an absolute and insuperable barrier to a party's testifying as to facts occurring before decedent's death, when the adverse party is an executor or administrator; and that the exclusion of the evidence is a privilege which the executor or administrator may waive, derives force from an examination of the third exception to section 5242. In *Rankin v. Hannan*, 38 Ohio St. 438, it was held, that where an administrator, in his own behalf, testifies to a certain conver-

sation and an agreement between his intestate and the opposite party, which was material to the issue, the other party may testify as to the same transaction and conversation under the third exception to section 5242 of the Revised Statutes. It is obvious that the interest of the testator's estate should be the paramount idea of the executor, and the law contemplates that if he has knowledge that can be made to inure to the benefit of the estate, he will be ready to bear witness, though in so doing he must waive the privilege of excluding the opposite party from testifying, and open the door to his admission.

The policy of our law in rendering available evidence in the possession of the adverse party is illustrated not only in compelling him to testify after a cause is at issue, but in requiring him to furnish evidence of which he is sole possessor, before the defendant has filed his answer. By section 5293 of the Revised Statutes it is provided that when a person claiming to have a defense to an action against him is unable, without a discovery of the fact from the adverse party, to file his answer, such person may bring his action for discovery, setting forth in his petition the necessity of such discovery and the grounds thereof, and such interrogatories relating to the subject-matter of the discovery as may be necessary to procure the discovery sought, which, if not demurred to, shall be fully and directly answered by the defendant. Upon the institution of legal proceedings and the death of the defendant, it would hardly be contended that his executor or administrator would not have the benefit of the discovery for which provision is made by the section. And yet, if an executor is to be precluded from calling as a witness the adverse party, he might, by parity of reasoning, be deprived of his right of discovery by means of interrogatories, and the estate of the decedent be thereby subjected to irreparable damage.

In some of the states, where there are statutes similar to our own, which make a party an incompetent witness where the opposite party is an executor or administrator, the executor or administrator may yet compel the surviv-

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ing party to be a witness, although the authority to compel him is given only by implication. Thus the code of Alabama, which enacts that "neither party shall be allowed to testify *against* each other, as to any transaction with or statement by any deceased person whose estate is interested in the result," etc., has been construed to allow the representative of the decedent to compel the opposite party to testify *for* the decedent's estate. *Dudley v. Steele, supra.*

So, too, the code of civil procedure of California positively excludes as witnesses "parties to an action or proceeding against an executor or administrator upon a claim or demand against the estate of the deceased." But in *Chase v. Evoy*, 51 Cal. 618, the court, in construing that portion of the code, say: "In view of the evil to be remedied, the legislature could hardly have intended to prohibit the executor or administrator from calling a party to the action to testify in behalf of the estate. On the opposite theory, the defendant, representing the estate, would not be permitted to call the plaintiff himself to prove that the demand was fraudulent or had been fully paid. Such a construction of the statute is wholly inadmissible, and would be at variance with its manifest intent." Decisions of a like tenor in other states might be adduced.

There are other considerations which occur to us, but in view of the foregoing, we are of opinion that the judgment of the court of common pleas and of the circuit court should be reversed for rejecting the testimony of Jennie Mansfield; and that the cause should be remanded for further proceedings.

NEWBURG PETROLEUM CO. v. WEARE.*Covenant running with land—Sale—Lease.*

On August 20, 1866, Weare owned certain oil-producing lands subject only to the unexpired terms of leases theretofore given by his grantors. The Newburg Petroleum Company, by assignment, owned such leases,

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and on that day released and quitclaimed to W. all its right, title, and interest in such lands without any reservation, and it put him into possession. In part consideration for this conveyance, W. covenanted and agreed for himself with the company to pay and deliver to the company, its successors and assigns, upon the leased premises, the one-sixth part of all the oil and other mineral substances produced or pumped thereon or therefrom, daily as produced during the remainder of the terms granted in the leases. On September 3, 1866, such conveyance and agreement were duly recorded, and on that day W. sold and conveyed to sundry parties all his interest in the different parts of such lands, and he put each grantee into possession of the part so conveyed. Thereafter and during the terms of the leases W.'s grantees produced large quantities of oil from the respective parts, but W. and his grantees failed and refused to account to the N. P. Co. for such production, or to pay and deliver the one-sixth part thereof, as W. agreed to do. The N. P. Co. brought its action against W. and his grantees on W.'s agreement with the N. P. Co., and it sought to hold these grantees liable for the covenant of W. To the petition alleging such facts these grantees demurred. *Held*, such agreement is personal to Weare, and did not run with the land so as to bind the grantees of Weare for his failure to perform such agreement.

ERROR to the District Court of Washington county.

On August 30, 1866, John H. Weare was the grantee of certain oil-producing lands in Washington county, upon which his grantors had given certain unexpired leases, under which the oil was then being obtained, and which leases were then owned, and work thereunder was being done, by the Newburg Petroleum Company.

On that day this company entered into a written contract with Weare, by which the Newburg Petroleum Company agreed to convey to Weare all the company's interest in these lands; and, as part of the consideration for such release, Weare agreed "to pay and deliver to the company, their successors and assigns, upon the premises so released, the one full equal sixth part of all the coal, carbon, or rock oil, salt, or other mineral substance excavated, produced, or pumped thereon, and therefrom daily as produced during the rest and residue now remaining of the terms granted in said above mentioned leases respectively."

The company, in fulfillment of this agreement, conveyed

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to Weare *all its interest* in these premises without any reservation whatever, and they put Weare into possession of the premises.

This conveyance was duly recorded on September 3, 1866; and on that day Weare conveyed, by different deeds, *all his interest* in the various parts of these same premises, to his several co-defendants; and he put such parties into possession of the several parts of the premises so conveyed.

During the terms of these leases these several parties procured large quantities of carbon or rock oil from these same premises; but neither Weare nor any of these several co-defendants paid or delivered to the Newburg Petroleum Company, or any one for them, the one-sixth part, or any part, of such carbon, or rock oil, as by his written contract Weare agreed to do; but, on demand, each party refused so to do, and each refused to account for any part of the same.

Thereupon the Newburg Petroleum Company brought suit against Weare and his several grantees to enforce such accounting, payment, and delivery, and to recover in kind or the value of the one-sixth part of such production. Plaintiff propounded certain interrogatories as to the amount and time of such production.

Certain questions in the case were disposed of in *Newburg Petroleum Company v. Weare et al.*, 27 Ohio St., 343, and the case was remanded to the court of common pleas for further proceedings.

By leave of court, on April 29, 1878, the plaintiff filed its second amended petition, in which it set forth the alleged facts and matters of complaint. On May 6, 1879, a demurrer to the second amended petition was filed by the Exchange Oil Company, one of these co-defendants of Weare. Other pleadings were filed at different times, but they need not be noticed here.

At the January term, 1880, this demurrer was sustained; and, at plaintiff's request, leave was given to amend the second amended petition.

At the ensuing May term no amendment had been made, but further leave to amend the same was given. At the October (15th) term, 1880, as no further amendment had been made, leave to file an amendment to the same was limited to sixty days. After the expiration of the sixty days, and without further leave of court, an amendment was filed, setting up the full performance of its agreement with Weare on the part of the plaintiff; and it also alleged "that when the said John H. Weare sold and conveyed the said demised premises to the said defendant, the Exchange Oil Company, of Cincinnati, Ohio, it, the said Exchange Oil Company, of Cincinnati, Ohio, had actual notice and full knowledge of the plaintiff's right under the said demises and the agreement with the said John H. Weare, and that the plaintiff was entitled thereunder, as a part of the purchase price of said transfer, to enter daily upon the demised premises during the remainder of the said terms, and to receive one-sixth of the production of the said petroleum oil in kind.

"And that it, said Exchange Oil Company, of Cincinnati, Ohio, agreed to and with the said John H. Weare to take, and did take, the said demised premises, subject to the plaintiff's right to one-sixth of the production in kind, and to enter upon the premises daily, and receive the same. And it, the said Exchange Oil Company, of Cincinnati, Ohio, agreed to and with said John H. Weare to satisfy the plaintiff's rights and claims by virtue of said demises and agreements, and agreed to take, and did take, the bond and obligation of the said John H. Weare to repay to it any sum that it would have to pay to the plaintiff."

On motion of the Exchange Oil Company, at the January term, 1882, this amendment was stricken from the files, "on the ground that it was irregularly filed without leave of court."

And thereupon the plaintiff moved the court for leave to file the said amendment to its second amended petition, and so ordered to be stricken out for reason of irregularity in filing; and the court overruled and denied the motion, find-

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ing there had been no laches to preclude the filing, but denying the motion solely for the reason that all of said amendment, except that portion relating to the agreement of the Exchange Oil Company with John H. Weare, presented no material substantial allegation in addition to the plaintiff's second amended petition; and for the reason that the part setting out the agreement of the Exchange Oil Company, of Cincinnati, Ohio, with John H. Weare, sets out a new and entirely different cause of action not affecting all the defendants; and the court refused leave to file the amendment in whole or with the allegation of the agreement between the Exchange Oil Company, of Cincinnati, Ohio, stricken out, to which ruling and decision the plaintiff excepted.

Thereupon the court sustained the demurrers to the second amended petition, filed on behalf of all the other defendants, except Weare, and gave them judgment against plaintiff for their costs; but the court rendered no judgment for or against Weare, though plaintiff moved for a judgment against him for failing to answer the interrogatories, to which refusal the plaintiff excepted.

On appeal, the district court held substantially the same as the court of common pleas had held; and it refused leave to file the amendment, and it sustained the demurrers of all the defendants, except Weare, and rendered judgment for their costs; to which plaintiff excepted, and now seeks a reversal of those judgments.

R. K. Shaw, for plaintiff in error.

W. B. Loomis and *E. A. Guthrie*, for defendants in error.

FOLLETT, J. The original action was upon plaintiff's contract with Weare. Weare did not perform his contract to pay and deliver to plaintiff the one-sixth part of all the oil produced or pumped from the premises, and he failed to account for the same; and he refused to do so.

Plaintiff claimed that this contract "*run with the land*," and that Weare and his assigns were bound by the con-

tract; and to enforce this claim the Newburg Petroleum Company brought an action against Weare and his assigns, and the company demanded an account of the oil produced, and a delivery of the one-sixth part thereof, or the value of this one-sixth part.

Weare's assigns, his co-defendants, claimed that this contract was only a *personal* agreement of Weare, that it was *not* a covenant that run with the land, and that it did not bind any one but Weare.

The questions presented to us by the record here are the only ones that we can review, and these questions arise upon the second amended petition and the demurrers thereto of the co-defendants of Weare.

Before considering *what* is thus presented, we may see if other matters require our examination. There was a contest as to the filing of certain amendments to the second amended petition.

It seems that the court of common pleas was liberal in granting leave to file such amendments, yet they were not filed within any leave the court granted.

We will not regard these amendments as *first* presented to the district court, as was the case in *Brock v. Bateman*, 25 Ohio St. 609, where the court refused leave to file such an amendment.

Here they were irregularly filed in the court of common pleas, without leave of court, and for this reason it was not error reviewable for the court to strike them from the files, especially as the court thereafter considered their *merits as allegations* in the petition before it refused to permit them to be properly filed. On full consideration the court refused leave to file this amendment, "solely for the reason that all of said amendment, except that portion relating to the agreement of the Exchange Oil Company with John H. Weare, presents no material substantial allegation in addition to the plaintiff's second amended petition; and for the reason that the part setting out the agreement of the Exchange Oil Company, of Cincinnati,

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Ohio, with John H. Weare, sets out a new and entirely different cause of action not affecting all the defendants."

On such an agreement plaintiff could have had a separate action against the Exchange Oil Company. In thus holding, we think the court did not abuse its discretion, or deprive plaintiff of any right. "Motions for leave to amend are addressed to the sound discretion of the court, and their refusal will not be held to be erroneous, unless it is affirmatively shown that the discretion was abused." *Clark v. Clark*, 20 Ohio St. 128.

As to plaintiff's demand for a judgment against Weare, as on default for not answering the interrogatories more fully, and the court's refusal to render such a judgment, section 5101 of the Revised Statutes provides: "Answers to interrogatories *may be enforced* by nonsuit, judgment by default, or by attachment, as the justice of the case may require."

From the record of this case, which presents to us the pleadings and the facts, we do not think there is manifest error in the court's exercise of a sound discretion.

As to plaintiff's action against Weare *alone*, the case has remained and still is in the court of common pleas, and it may be proceeded with there.

We will now inquire as to what questions are presented to us by the second amended petition and the demurrers thereto of the Exchange Oil Company and of the other co-defendants of Weare.

Among other things, plaintiff avers the making and assignment of certain oil leases on these lands, and that on August 30, 1866, the plaintiff was seized of all the right, title, and interest of the lessees in and to the residue then unexpired of their terms in the premises.

"And that on the 30th day of August, A. D. 1866, the defendant, John H. Weare, held the title in fee of said premises subject to the rights of the plaintiff as assignee, as above mentioned of the said unexpired terms. And the plaintiff says that after it, the said plaintiff, became seized of the said premises for the said unexpired terms as afore-

said, and while the plaintiff was in actual possession of the said demised premises, holding them under the said leases, and after the said John H. Weare, defendant, became the owner of the fee as aforesaid, subject to said demises, and while Weare was such owner, holding subject to said demises, to wit, on the 30th day of August, A. D. 1866, the plaintiff, by its duly authorized agent, entered into a contract and agreement, in writing, with the defendant, John H. Weare, which contract John H. Weare duly signed, sealed, and acknowledged before a notary public of Washington county, in the state of Ohio, in the presence of two witnesses, who signed their names thereto as witnesses.

“In which written agreement it was recited that the said leases heretofore mentioned were then owned by the said Newburg Petroleum Company, the plaintiff herein. And the plaintiff says that in the written agreement so made and executed by the plaintiff and John H. Weare, on the 30th day of August, 1866, the plaintiff agreed to and with John H. Weare to remise and release and forever quitclaim, and did therein remise, release, and quitclaim unto John H. Weare all the right, title, and interest of the Newburg Petroleum Company, of, in and to the lands conveyed by and described in the leases.”

After such a conveyance no interest in these lands remained in the plaintiff, except the possession. But the plaintiff did not retain the possession.

“And the plaintiff says that after making and delivery of the said contract, the plaintiff put John H. Weare into possession of all the premises so as aforesaid remised, released, and quitclaimed under and in pursuance of the written agreement and contract.”

This is plaintiff's statement of the case, and the demurrers admit all this to be true.

And with other considerations “the plaintiff says that John H. Weare, in the written agreement, duly executed and delivered by him, under seal, did covenant and agree to and with the plaintiff, the Newburg Petroleum Company, to pay and deliver to the Newburg Petroleum Company,

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its successors and assigns, upon said leased premises, the one full equal sixth part of all the carbon or rock-oil, salt or other mineral substances produced or pumped thereon or therefrom daily, as produced during the rest and residue then remaining of the terms granted in said above mentioned leases respectively."

By the *terms* of this agreement as set forth Weare binds himself alone. And he does not grant to plaintiff any interest in the land itself; and he does not agree to produce any oil or mineral substance from the land; but if, during the terms of those leases, any oil or mineral substance is "produced or pumped thereon or therefrom"—which will thus be separated from the realty and become personalty—Weare agrees to pay and deliver upon said leased premises, to the Newburg Petroleum Company, its successors and assigns, the one full equal sixth part of such oil or mineral substance, daily, as produced.

Such seem to be the language and the meaning of the parties' agreement, and that Weare alone is bound, and that his assigns are not bound. But it is claimed that the plaintiff may hold the assignees of Weare by virtue of the principle in the *first rule* given in *Spencer's Case*, 1 Smith Lead. Cas. *69: "L. When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo*, annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it can not be appurtenant or annexed to the thing which hath no being."

The plaintiff, as assignee of these leases, owned no part of these lands, and it had only a right, for a term of years, to produce or pump oil and other mineral substances on and from these lands. Subject to this right for such terms of years, Weare owned these lands and all that was appurtenant thereto; and when the plaintiff released and conveyed to Weare, without reservation, this right and all plaintiff's interest in the lands, and put him into pos-

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session of the same; and when it took Weare's agreement to pay and deliver to plaintiff the one-sixth part of what *should be* produced or pumped thereon or therefrom; there was no "thing *in esse*, parcel of the demise," that was "annexed and appurtenant to the thing demised," so as to bring this case within the *first* part of that rule in *Spencer's Case*; and it seems to fall within the *second* part of that rule, and that the covenant binds "the covenantor, his executors or administrators, and not the assignee."

Weare did not attempt to bind his assigns in express terms, and he did not make the payment of the one-sixth part of the production a charge on the land; neither did the law make such payment or delivery a lien upon the land, as it does in case of a tax on land.

We need but refer to the "much learning" upon this general subject collected in connection with *Spencer's Case*, in Smith Lead. Cas. *68 *et seq.*

There is no error apparent upon the record that requires a reversal of the judgments in this case, and the same are affirmed as to all the defendants, except Weare. This is done without any prejudice to the plaintiff's action and rights against Weare in this case, which as to such rights is still pending in the court of common pleas of Washington county.

Judgment affirmed.

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Life insurance—Revised Statutes, section 3628—Exemption of fund from execution—Foreign company—Foreign judgment—Interpleader.

1. Section 3628 of the Revised Statutes, which provides that a person may effect insurance on his life for benefit of his widow or children, and the amount of insurance coming due shall be payable to such widow or children exempt from claims of the representatives and creditors of such person, but the amount of annual premiums shall not exceed \$150, and in case of excess there shall be paid to the beneficiaries such portion of

44	613
48	271
44	613
162	45
44	613
208	87

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the insurance as the sum of \$150 will bear to the whole annual premium, and the residue to the representatives of the deceased, applies as well to a policy issued by a company organized and conducted outside the limits of Ohio as to a policy issued by a company of this state.

2. In a suit brought against the company, by the widow of such insured person, upon a policy in which she is named as the beneficiary, in a court in the state where such company is located, and in which suit, by direction of the court, the company brings into court a sum of money sufficient to satisfy the amount due on the policy, and obtains an order requiring the administrator, resident of Ohio, to appear and interplead with such widow as to their respective claims under the policy, service in Ohio of copy of such order, and of citation upon such administrator, does not give the court jurisdiction of his person, and (there being no appearance nor other service on such administrator) a judgment in the action purporting to debar him from any claim or right as against such widow is, as to him, void.

ERROR to the District Court of Tuscarawas county.

The action below was commenced by the filing in the court of common pleas of a petition which, in substance, alleges :

That the plaintiff is the administrator of Wm. Armstrong; that the assets are insufficient to pay the debts, and that the defendant is the widow of the deceased. The intestate, April 26, 1870, effected an insurance upon his life, for the sum of \$10,000, in the Provident Life and Trust Company of Philadelphia, Pa., then doing business in Ohio as an insurance company, and caused the policy to be made payable on its face to his wife, Polly Armstrong, the defendant. By the terms of the policy, the assured, William Armstrong, agreed to pay, and did annually pay, the sum of \$594 yearly premium for such insurance, from the date of the policy until the time of his death, which occurred March, 1879. The intestate, at the time of his death, held the policy in his possession at his domicile in Ohio. The deceased, the plaintiff, and the defendant, were always citizens of, and domiciled in this state. After the death of the assured, the defendant obtained possession of the policy, collected of the company the entire amount secured thereby, and surrendered it to the company; and she now holds the

sum of \$7,475.75 of the \$10,000 received by her, for the use of the plaintiff, as the representative of the deceased.

To this an answer was filed, which alleges in substance:

First. That the Provident Life and Trust Company is a corporation organized under the laws of Pennsylvania; that the insurance contract mentioned in the petition was effected in that state, to be performed and was performed in that state; and that by the laws of Pennsylvania, and by virtue of the contract, the right vested in the defendant to receive the whole of the insurance money secured by the policy for her sole use and benefit.

Second. That July, 25, 1879, the defendant instituted a suit in a common pleas court of the city of Philadelphia upon that policy, against the insurance company, to recover the \$10,000 named therein; that before plea pleaded, the company came into court and suggested that the administrator of William Armstrong claimed to have some interest in the insurance fund, and prayed for leave to bring the money into court and for an interpleader between the said Polly Armstrong and the administrator of her husband, touching their rights, respectively, to the proceeds of such insurance; that such leave was granted, and a rule entered requiring the administrator to show cause why an interpleader should not be awarded between him and Polly Armstrong to determine their respective rights and ownership in the fund agreeably to the laws of Pennsylvania, a copy of which rule, under the seal of the court, was, pursuant to the laws of Pennsylvania and the practice in said court, delivered to said administrator at the county of Tuscarawas, and state of Ohio, together with a letter from the attorney of the company, notifying him that under the laws of that state it was necessary for him to appear. Afterward, the rule being made absolute, and the money having been paid into court, a citation was duly issued under seal, requiring and summoning the administrator to appear in court and interplead, and notifying him that in case of default the monies would be awarded to said Polly, and he declared estopped and debarred from any further right or

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claim therein, which citation, pursuant to the laws of Pennsylvania, was duly served on the administrator by delivering the same to him at said county of Tuscarawas. The administrator not appearing, the court adjudged and decreed that the entire fund be paid to Polly, and that the administrator be estopped and debarred from all claim to any part of said fund or in the policy of insurance.

To this answer the plaintiff interposed a general demurrer. The court of common pleas overruled the demurrer and rendered judgment for defendant, which judgment was affirmed by the district court. To obtain a reversal of these judgments, the petition in error is filed in this court.

H. T. Stockwell, for plaintiff in error.

The law of Pennsylvania was not sufficiently pleaded in the answer. The allegation on that subject is a mere conclusion of law, wholly destitute of any element of fact; and there are no facts stated in the answer that justify such conclusion. *Peterson v. Roach*, 32 Ohio St. 374, *P. C. & St. L. Ry. Co. v. Moore*, 33 Ohio St. 384; *Mitchell v. Treasurer Franklin Co.*, 25 Ohio St. 153; *Commissioners v. Noyes*, 35 Ohio St. 207.

The assured having performed all the conditions of the policy, and having the same in his possession at his domicile, in Ohio, upon his death the laws of this state operated upon and vested the title thereto, and the fund in controversy, according to section 3628 of the Revised Statutes.

The law of the domicile controls as to the title, transfer, succession, and distribution of personal property and choses in action. *Swearingen v. Morris*, 14 Ohio St. 424; *Fuller v. Steiglitz*, 27 Ohio St. 355; Story Con. Laws, secs. 21, 51, 362, 379n., 380, 381.

The Pennsylvania judgment was, as to the plaintiff, a nullity. In order that a judgment of a sister state can have any force or effect in this state, the court rendering it must have had jurisdiction of the subject-matter and the party. *Pennywit v. Foote*, 27 Ohio St. 600; *Hemminway v. Davis*, 24 Ohio St. 150; Story Con. Laws, secs. 539, 546, 609;

Hall v. Williams, 6 Pick. 232; *Bissell v. Briggs*, 9 Mass. 462; *Scott v. Noble*, 72 Pa. St. 115; *Price v. Hickok*, 39 Vt. 292.

The proceedings in the Pennsylvania court had none of the essential requisites of a proceeding *in rem*.

J. T. O'Donnell and *Alexis Cope*, for defendant in error.

The contract of insurance was made in Pennsylvania and was to be and was performed in that state.

A contract of insurance is to be interpreted by the law of the place where made. Story Con. Laws, secs. 271-283; 2 Par. Con. 707.

The place of the contract governs as to its nature, obligation, and interpretation. Story Con. Laws, secs. 258a, 263; *Lowther v. Lawrence*, W. 180, 186, 187; *Walker v. Whitehead*, 16 Wall. 314-317; *Milliken v. Pratt*, 125 Mass. 382; Pom. Int. Con. Law, secs. 592-594; *Green v. Collins*, 3 Cliff. 494. And also as to the capacity of persons to contract, Story Con. Laws, sec. 241; 2 Par. Con. 702. So also as to the validity of the contract. Story Con. Laws, sec. 242.

These principles apply to insurance contracts. *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 195; *Eadie v. Slimmon*, 26 N. Y. 9; *North America Life Ins. Co. v. Wilson*, 111 Mass. 542; *Thwing v. Great Western Insurance Co.*, 111 Mass. 109; *Pomeroy v. Insurance Co.*, 40 Ill. 400; *Fuller v. Linzee*, 135 Mass. 468.

In the following cases a directly opposite view is held from that taken in *Morris v. Penn Mut. Life Ins. Co.*, 120 Mass. 503, and *Holmes v. Charter Oak Life Ins. Co.*, 131 Mass. 64, where it was held that the non-forfeiture law of Massachusetts applied to insurance contracts made outside the state, and which cases stand alone and unsupported. *Shattuck v. Mut. Life Ins. Co.*, 4 Cliff. 598; *Desmazes v. Mut. Ben. Life Ins. Co.*, 7 Ins. L. Jour. 926; *Whitcomb v. Phoenix Mut. Life Ins. Co.*, 8 Rep. 642; *Smith v. Mut. Life Ins. Co.*, 5 Fed. Rep. 582.

When the plaintiff would have no right of action by the laws of the state where the contract was made and to be

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executed, he can have no right here. When a contract is made within the jurisdiction of a foreign state, and contemplates no action outside of that jurisdiction, it is clear that the question of its validity must be determined solely by the laws of that state. *Knowlton v. Erie Railway Co.*, 19 Ohio St. 263-268.

Matters bearing on the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. *Scudder v. Union National Bank*, 91 U. S. 406.

When the Provident Life and Trust Company was sued by the widow upon the policy, filed its suggestion, not denying but admitting its indebtedness, asked that an interpleader be awarded, and brought the money into court to be paid to whomsoever the court should direct, the court thus obtained jurisdiction of the fund, and from that time forward the proceeding was essentially a proceeding *in rem*. The court having thus obtained jurisdiction of the *res*, and having given proper notice, as required by the laws of the state of Pennsylvania, had ample power to hear and determine as to all the rights of the parties in and to the fund, and having so heard and determined, the parties are bound by the judgment. *Cooper v. Reynolds*, 10 Wall. 308; *Tyler v. Defrees*, 11 Wall. 344; *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294; *Gunn v. Plant*, 94 U. S. 669; *Hunt v. Hunt*, 72 N. Y. 239-241; *Matthews v. Densmore*, 109 U. S. 219; Story Eq. Jur., secs. 64k, 65, 800-824; Rorer Jud. Sales, secs. 59-62; Freem. Judg., sec. 606; *Pilton v. Platner*, 13 Ohio, 209; *Paine v. Moreland*, 15 Ohio, 445.

It is not a question of the succession of personal property or choses in action. The decedent had no title to the policy. He could not assign or transfer it without the consent of the beneficiary, and could not dispose of it by will. The policy belonged, the moment it was issued, to the beneficiary. The life insured had no legal or equitable in-

terest in it. *Allis v. Ware*, 10 Ins. L. Jour. 651; *Ricker v. Charter Oak Life Co.*, *supra*; *Wagner v. Karman*, 7 Am. Law Rec. 670.

SPEAR, J. The questions arising in the case are presented by the demurrer to the answer. It will be observed that there is no denial of the allegations that at the time of the effecting of the insurance upon the life of William Armstrong he and the defendant were residents of and domiciled in Ohio, and that they continued to so reside until his death, and she has ever since resided within the state; that the premiums, \$594 each year, were wholly paid by the husband; that the debts of the estate are over three thousand dollars, while the ~~assets~~ are not more than seven hundred, and that the ~~defendant~~ has received from the insurance company the entire amount of the insurance money covered by the policy, ten thousand dollars.

The claim of the plaintiff is based upon the statute of Ohio, section 3268, while the defendant's claim is that the rights of the parties are measured by the laws of Pennsylvania, the place where the contract was made and was to be enforced, and that those rights have been adjudicated and determined by the decree and judgment of the court of common pleas of Philadelphia, set up in the second defense of the answer. It is urged that by the common law the contract of insurance is to be construed by the law of the place where made; that the law of that place governs as to the nature, obligation, and interpretation of the contract; that when the plaintiff would have no right of action by the law of the state where the contract was made and to be performed, he can have none here, and that, by the laws of Pennsylvania and by virtue of the contract, the right vested in the defendant to receive for her own exclusive use the whole of the money secured by the policy.

Assuming, without holding, that the law of Pennsylvania is sufficiently pleaded in the answer, and that unless the question is determined by the statute referred to, the claim made by the defendant as to the effect of the law of

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Pennsylvania upon the rights of the parties here is conclusive, how, if at all, are those rights affected by section 3628 of the Revised Statutes? That section reads as follows:

“Any person may effect an insurance on his life, for any definite period of time, or for the term of his natural life, to inure to the sole benefit of his widow and children, or of either, as he may cause to be appointed and provided in the policy; and the sum or net amount of insurance becoming due and payable by the terms of insurance shall be payable to his widow, or to his children, for their own use, as provided in the policy, exempt from all claims by the representatives and creditors of such person; but the amount of premium annually paid on such policy shall not exceed the sum of one hundred and fifty dollars, and, in case of such excess, there shall be paid to the beneficiaries named in the policy such portion of the insurance as the sum of one hundred and fifty dollars will bear to the whole annual premium, and the residue to the representatives of the deceased.”

In obtaining an insurance of this kind the manifest intent of the husband is to make provision for those dependent upon him, a purpose every way rightful and laudable. It is to be done by applying, from year to year, the money of the husband, obtained from proceeds of his own labor or otherwise, to the future use and benefit of those who stand in such relation to him as to give them a natural claim to his efforts, forethought, and bounty. And up to a certain point, as to expenditure, such provision may legally be made. In the same spirit our laws allow to the widow dower in lands, use of the mansion-house one year, a homestead right, a year's support out of the personalty, a given proportion of the residuum after debts are paid, and certain specific articles of personal property, if such the deceased possessed. But the same laws recognize others as having rights as regards the property of the deceased. The creditors are not to be wholly ignored, even though there be a needy widow and needy children. As to the section referred

to, while it recognizes the right of the husband to make provision for those of the family, who may survive, to the extent of one hundred and fifty dollars yearly thus invested, it also provides that as to insurance effected by payments over that sum it shall inure to the legal representative. No question is made that as to contracts with Ohio companies the statute would apply. Should it receive such construction as to confine its operation to that class of contracts? It is not doubted that it is competent for the general assembly to enact laws which in effect forbid citizens of the state from resorting to the courts of sister states for the purpose of defeating the operation of laws of Ohio as to questions which affect the rights of other citizens of Ohio. The law which gives to a debtor, the head of a family, and not the owner of a homestead, an exemption as against a claim of a creditor in attachment, where the sum due the debtor is shown to be necessary for the support of the family, is a law of that kind, inasmuch as it is held that such creditor may be enjoined from bringing action in courts out of Ohio where no such exemption could be permitted. And the law in question, if it applies to policies issued by companies other than those organized in Ohio, is an inhibition against citizens of Ohio placing moneys beyond the reach of creditors by entering into contracts with insurance companies organized out of this state. It will be noticed that the words of the statute do not limit its application. The language is comprehensive, and in terms it applies to all contracts of insurance obtained by citizens of the state. Why should we assume that the legislature intended that if the company happen to be a home company the statute applies, while if one located in another state it does not apply? Why not assume, rather, that that body intended to correct the mischief which the very enactment of the statute raises the implication then existed? It is but the ordinary rule to give such construction to statutes as will advance the remedy and correct the mischief. Applying the law only to home companies would, in great measure, defeat the very purpose apparent in this legislation. The

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general assembly must be assumed to have at least such general and common knowledge upon subjects of legislation as is possessed by citizens at large, and it is matter of common information that the great proportion of policies written upon the lives of citizens of Ohio are issued by companies organized outside the state, and there is little doubt that this was true in a larger sense even, at the time this statute was enacted (1847), than it is now. Statistics, believed to be reliable, show that in the year 1884, out of about fifteen thousand policies and certificates written upon the lives of citizens of this state more than ten thousand were written by foreign companies, and out of thirty-three millions of dollars, gross amount covered by those policies and certificates, nearly twenty-five millions were in policies issued by foreign companies. It is probable that, prior to the organization of the various relief and aid associations now so common, the disproportion was greater than the above figures show.

The parties to this litigation are citizens of the state of Ohio, and were when rights under this policy accrued. Those rights are being adjudicated in the courts of Ohio. Why should those courts ignore our own law, or make it subordinate to the law of another state? We think they should not. To do so would permit a citizen largely indebted to invest his capital and earnings to an unlimited amount for the benefit of members of his family in insurance contracts in distant states, thus working a fraud upon deserving creditors by placing such sums beyond their reach, notwithstanding such investments would be in spirit a plain violation of the whole policy of our laws regulating the respective rights of debtor and creditor. Very much more might be said in elaboration of this view, but we deem it unnecessary to take farther space, as we feel confident that enough has been indicated to make it clear that the demurrer, as to the first defense of the answer, was well taken and should have been sustained.

Does the second defense set up in the answer stand in the way of a recovery? The contention on part of de-

fendant is that by the judgment of the Philadelphia court the matter in issue here is *res adjudicata*, and this is so if that court had jurisdiction of the subject-matter and of the person of the plaintiff. The record shows that the service on the plaintiff was by delivering to him, in Ohio, a copy of the rule of court requiring him to show cause why the court should not give direction to the company to bring the \$10,000, owing by it on the policy, into court, and why he should not interplead with Mrs. Armstrong as to conflicting rights to such money, together with a letter from the company's attorney advising him to appear, and by like service afterward of a copy of a rule absolute and of citation to appear and interplead. Is such notice sufficient to require an Ohio administrator to go to another state to litigate in the courts of that state, with a citizen of Ohio, questions arising under the laws of Ohio affecting the estate which he represents, or refuse at his peril? It is probable that no injustice would in this case be done if the question were put in this way: Can a resident of Ohio resort to the courts of another state and there compel an administrator, resident of Ohio, and deriving his authority from the courts of this state, to litigate a dispute existing between them, wherein the rights of the administrator depends upon the law of Ohio, for the express purpose of evading the effect of our statute, and of obtaining a judgment which would be contrary to the law of the domicile of both?

It is urged that when the company asked that an interpleader be awarded, and brought the money owing by it into court, the court then obtained jurisdiction of the fund, and from that time forward the proceeding was one essentially *in rem*, and the court having thus obtained jurisdiction of the *res*, and having given notice according to the laws of Pennsylvania, had ample power to hear and determine, and having so heard and determined, the parties are bound by the judgment. That such proceeding could be *in rem* seems a novel doctrine. "*In rem*" is understood to be a technical term, taken from the Roman law, and there

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used to distinguish an action against the thing from one against the person, the terms *in rem* and *in personam* always being the opposite one of the other; an act *in personam* being one done or directed against a specific person, while an act *in rem* was one done with reference to no specific person, but against or with reference to a specific thing, and so against whom it might concern, or "all the world." A proceeding brought to determine the status of the thing itself, the *particular thing*, and which is confined to the subject-matter *in specie*, is *in rem*, the judgment being intended to determine the state or condition, and, *ipso facto*, to render the thing what the judgment declares it to be, while a proceeding which seeks the recovery of a personal judgment is *in personam*. In the former, process may be served on the thing itself, and by such service and making proclamation, the court is authorized to decide upon it without other notice to persons, all the world being parties; while in the latter, in order to give the court power to adjudge, there must be service upon those whose rights are sought to be affected. As regards rights, the terms signify the antithesis of "available against a particular person," and "available against the world at large." Thus, "*jura in personam* are rights primarily available against specific persons, *jura in rem* rights only available against the world at large." Beyond this, a judgment or decree is *in rem*, or in the nature of a judgment *in rem*, when it binds third persons, such as the sentence of a court of admiralty on a question of prize, or a decree of other courts upon the *personal* status or relation of the party, such as dissolution of marriage contract, bastardy, etc., a decree in probate court admitting a will to probate and record, granting administration, etc., or a decree of a court of a foreign country as to the status of a person domiciled there. We quote from Freeman on Judgments the definition of judgment *in rem* given by that author: "An adjudication against some person or thing, or upon the *status* of some subject-matter, which, wherever and whenever binding upon *any* person, is equally binding upon *all* persons." In contrast, a judgment *in per-*

sonam is, "in form, as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the record itself." *Woodruff v. Taylor*, 20 Vt. 65. From all which it appears that a judgment *in rem*, at least when against any *thing*, may bind the *res* in the absence of any personal notice to the parties interested, but a judgment *in personam*, as we have seen, can have no validity except upon service upon the interested parties, or what is equivalent to it. Why was the Philadelphia action, in its nature, not a proceeding between parties claiming right to money due under the policy, rather than a proceeding to determine the *status* of such money? If it was the former, then the efficacy of the judgment depended upon having the parties before the court, so that their conflicting claims could be adjudicated; if the latter, then it would appear to be one wherein the court's judgment would have been effectual and conclusive, without reference to whether the parties were before the court or not, and the rights of both of them could have been as well settled by the filing of a bill by the insurance company and the bringing of the money into court, and without the presence, by service or appearance, of either of the parties claiming to be interested in the fund. It was not the status of any particular money that was to be determined, for any money which was a legal tender would have effectually satisfied the claim of the party receiving it; nor was there any claim primarily by even the widow, much less the administrator, to any money *in specie*, nor did either the company or the widow, at any time, claim or admit that the administrator had any money or property within the jurisdiction of the court, or valid claim to any subject-matter sought to be affected by the decree to be rendered. The proceeding was clearly one of interpleader, and that only. We do not understand that an action *in personam*, simply because a debtor brings money, the right to recover which is in contention, and gives to the custody of the court a sum sufficient to discharge his debt, changes into an action *in*

rem, for that an interpleader suit is, in its nature, a proceeding *in rem*. In the Philadelphia case the company could have begun the action by original bill and obtained a complete standing in court, if, with other proper averments, the pleader had alleged a willingness to bring the money into court. Manifestly, the action thus begun would not have been *in rem*. Then, does the mere fact that the company (the debtor) being sued, voluntarily delivers money to the clerk of the court rather than keep it in its own safe, or to its credit in bank, or loaned upon call, change the action from one *in personam* to one *in rem*? We think not.

It will be borne in mind that the Philadelphia suit was essentially unlike an attempt to reach, by process of attachment, the property of an absent party. It was rather an attempt to estop the administrator from claiming any recovery against the company, to draw the estate of William Armstrong to a distant state for settlement, and an attempt to compel the administrator to litigate, against his will, in a Pennsylvania court, a controversy affecting the estate, and with another resident of Ohio; hence the class of cases which treat proceedings in attachment as substantially proceedings *in rem* have no application to the case at bar.

If the case made in the answer can not be treated as a suit *in rem* it appears clear that the judgment rendered is void as against the administrator for want of jurisdiction at least of his person. No support is given that judgment by the constitutional provision and the act of congress of 1790, passed pursuant to it, which gives in all states the same faith and credit to a judgment of a state as it has by law or usage in the courts of the state where rendered; for, whatever strict construction was given that provision by the earlier decisions, it is now well settled that parties sought to be affected by a judgment rendered in another state are not precluded from showing that the court wherein the action was pending had no jurisdiction, either of subject-matter or of the person, for in order to entitle a judgment rendered to such full faith and credit the court

must have had jurisdiction as well of parties as of subject-matter.

The law on this point is well stated by Johnson, J., in *Pennywit v. Foote*, 27 Ohio St. 618, as follows: "From a careful review of numerous cases we find the rule now well settled that neither the constitutional provision, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court in which the judgment offered in evidence was rendered, and such a judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist, and this is true either as to the subject-matter or the person, or in proceedings *in rem* as to the thing."

The state of Pennsylvania could not extend its sovereignty into the state of Ohio; it could not in an action *in personam* compel a citizen of this state to respond to the process of its courts served in this state. "No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story on Conflict of Laws, section 539. "The jurisdiction of state courts is limited by state lines, and, upon principle, it is difficult to see how the order of a court, served upon a party out of the state in which it is issued, can have any greater effect than knowledge brought home to the party in any other way. Mere knowledge of the pendency of a suit in the courts of another state, without service of the process, or an appearance, is not sufficient, of itself, to compromise the rights of the party in this state." *Ewers v. Coffin*, 1 Cushing, 23, 28.

The conclusion we have reached is strengthened by a consideration of the policy and provisions of our statute which directs in what county an administrator may be sued.

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Section 5031 of the Revised Statutes provides that actions against an executor, administrator, guardian, or trustee, may be brought in the county wherein he was appointed or resides, in which case summons may issue to any county. Now, had this widow brought an action in Ohio to settle the rights of the parties to the amount due on this policy, the above section would seem to limit jurisdiction of such action to the courts of the county of Tuscarawas, and while so careful a provision is made as to the *situs* of suits against administrators in this state it would appear anomalous to permit the defendant, by choosing a court in another state, to compel the administrator to follow her there to defend the claims of the estate he represented.

We are of opinion that the demurrer to the answer should have been sustained.

Judgments reversed.

44s	628
49	347
44	628
56	114

THE STATE *ex rel.* CRAWFORD v. MCGREGOR.

Sheriff—How vacancy in office filled—Coroner—Revised Statutes, sections 11, 1202, 1208, 1219—Elections—Canvassing board—Mandamus.

1. Where the offices of sheriff and coroner both become vacant, the county commissioners may, the court of common pleas not being in session, fill the vacancy in the office of sheriff, by the appointment of a suitable person to hold for the unexpired term of the sheriff, whose place the appointment is made to fill, although the vacancies should occur more than thirty days before the next November election; section 1208, and not section 11, of the Revised Statutes, applying to such case.
2. Where a person, elected to the office of sheriff for a full term at a biennial election, as provided in section 1202, of the Revised Statutes, dies after he has qualified, but before the commencement of the term to which he had been elected, the term to which he had been elected is, in contemplation of section 1208, to be regarded as his "place;" and this is so, although, for a part of the time, it was filled by the coroner under section 1219 of the Revised Statutes.
3. The clerk of the court of common pleas and the justices called to his assistance to abstract the votes of an annual election, can not be required by mandamus to abstract votes cast for a person or persons for an office, unless the same is required to be filled by the electors at such election.

MANDAMUS.

J. A. Ambler, George E. Baldwin, J. J. Grant, D. F. Reinoehl, and Joseph Frease & Son, for relator.

Harrison, Olds & Marsh, Powell & Ricketts, John C. Welty, and Austin Lynch, for defendants.

MINSHALL, J. At the general election of October, 1883, James Lee was elected sheriff of Stark county for the full term of two years, commencing, as the statute (section 1202, Revised Statutes) provides, on the first Monday of January, 1884. He qualified, entered upon and performed the duties of the office until December 8, 1885, when he died. He had, however, at the previous general election, been re-elected for a full term, and had given bond and qualified as required by law, previous to his death.

Upon the death of Lee, Augustus Leininger, the coroner of the county, who had been elected for a full term at the October election of 1884, entered upon and performed the duties of the office of sheriff until January 7, 1886, the expiration of Lee's first term. At which time, his term as coroner not expiring until the first Monday of January, 1887, he gave bond as acting sheriff of the county, entered upon and continued to perform the duties of the office of sheriff until September 10, 1886, at which time he resigned his office of coroner; and, the court of common pleas not then being in session, was immediately appointed by the commissioners of the county to fill the vacancy in the office of sheriff. Leininger at once accepted the appointment, gave bond, qualified and entered upon the duties of the office as such appointee, and continues to do so under his appointment, and claims the right to do so until the first Monday of January, 1888, the expiration of the term to which Lee was re-elected. He therefore made no proclamation for the election of a sheriff, at the last general election; but, it being claimed that there was a sheriff to be elected, the relator was placed in nomination by his friends, and received over 7,000 votes; others were voted for, but he received the

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greatest number cast for any one person; and if, under the law, the electors of the county had the right to fill, by election, the unexpired part of the term to which Lee had been re-elected, there is not much doubt but that the relator was elected to fill the same at the last November election, and the respondents should have counted the votes cast for him, and have made the proper return. The clerk and his associates in the canvassing board, claiming that there was no such election to be held, refused to abstract the votes that had been cast for any person for the office of sheriff. This suit is prosecuted to compel the respondents to do what they have refused to do.

It may be conceded that it was not the duty of the clerk and the justices, as a canvassing board, to determine that there was no election of sheriff to be held, and to refuse, for such reason, to count and abstract the votes that had been cast for the different persons as sheriff. Nevertheless, as the remedy sought in this action can only be had when the right is clear, if there was no vacancy in the office of sheriff of Stark county to be filled by an election, the writ should be refused, as it is neither the policy nor the practice of courts to require the doing of a vain thing.

The questions arise upon the construction of sections 11 and 1208 of the Revised Statutes. These questions are: (1) whether the general provision of section 11, or the special provision of section 1208, applies; and (2) if the special provision of the latter section applies, then what is the proper interpretation of the clause contained in it, that the person appointed as therein provided shall "hold his office for and during the unexpired term of the sheriff whose place he fills."

1. The provisions of these two sections, requiring a construction, are as follows: "Sec. 11. When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy. . . ." "Sec. 1208.

When the offices of sheriff and coroner become vacant, the court of common pleas, if in session, or the county commissioners, if the court is not in session, shall appoint some suitable person to fill the vacancy in the office of sheriff, who shall give bond and take the oath of office prescribed for the sheriff, and hold his office for and during the unexpired term of the sheriff whose place he fills. . . .”

The general provisions of section 11 and the special provision of section 1208 of the Revised Statutes are in apparent conflict. Both can not apply to the case. Under the general provisions of section 11, the office of sheriff being an elective one, the successor of Leininger, an appointee, should have been elected at the last November election, that being the next proper election, as it was held more than thirty days after the vacancy in the office of sheriff occurred. For we can not agree with counsel for the respondents that the term, “the next proper election,” as used in this section, might, as applied to this case, mean the next election of a sheriff for a full term. If such had been the intention of the legislature, it would have used language more appropriate to its expression.

But we think this section does not apply to this case. The provisions of section 1208 can, and should, be read as an exception to the general provisions of section 11. This is in accordance with the established rule of construction, where the general provisions of a statute are varied by the special provisions of the same or another statute relative to the subject. The courts presume an intention in the legislature to be consistent in the making of laws; and also to have had a purpose in each enactment and all its provisions. Special circumstances often create a necessity for appropriate special provisions, differing from the general rule upon the same subject; and so, where such provisions are found in a statute, different from the general provisions that would apply to the case, the courts must assume that the special provisions were made for adequate reasons, and give them effect by construing them as exceptions to the general rule contained in the general pro-

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visions of the statute. In this way, without disregarding any of its provisions, effect is given to each and all the provisions of a statute. Potter's Dwarria, 272; Sedgwick Stat. Law, 423. And where, as in this case, the special provisions of one section, operating as an exception to the more general provisions of another, are uniform in operation throughout the state, they are not in conflict with the constitutional provision requiring all laws of a general nature to have such operation.

2. What, then, is the proper interpretation of the clause in section 1208, that the person appointed sheriff, as therein provided, shall "hold his office for and during the unexpired term of the sheriff whose place he fills." It will not be claimed that, if Lee had lived and entered upon his second term, though but for one day, the person who might have been appointed to fill the vacancy thus created would not have held during the unexpired term of the deceased; for the appointee, under this section, is, in all cases, to hold for "the unexpired term of the sheriff whose place he fills." But was the full term made vacant by the death of Lee several weeks before the first Monday of January, 1886, any the less his "place" than the part that would have remained of it had he lived to enter upon and exercise the duties of sheriff for one day before he died? In either case his title must be regarded as relating to a future period of time; and there is no more verbal accuracy in designating a part of the term as his place, than in so designating the whole. He had the same title to the whole term that he would have had to an unexpired part of it, had he lived to enter upon the term itself. By his election and qualification he had been clothed with the political right or authority to enter upon the performance of the duties of the office as soon as the term began. An entry upon the performance of the duties of an office is not requisite to the title to do so. A house that has been completed is none the less the house of the owner, though not yet occupied by him.

The point, however, made is, that when Lee died, Lein-

inger, being coroner, became, under section 1219, Revised Statutes, sheriff for and during his term of coroner, ending on the first Monday of January, 1887; and, therefore, when he resigned his office of coroner on September 10, 1886, the place that was to be filled in the office of sheriff was the unexpired part of his term as sheriff, *ex officio*. There are several objections to this view. In the first place, it would not help the relator; as, in such case, there would have been no vacancy in the office of sheriff to fill at the last November election, and there is no provision in the law for filling a prospective vacancy in the office by election, other than the biennial elections provided for in section 1202, Revised Statutes. Each election so held is for a term of two years, beginning on the first Monday of January next after the election. The election, the commissioners may order, under section 1208, is to fill an *existing vacancy* in the office, created by death, resignation, removal, or permanent disability of the sheriff. It is to fill, not a prospective, but an actual vacancy occurring from any of the enumerated causes. In the next place, under section 1219, the coroner does not become the sheriff of the county; the provision is, that "during the time when the office of sheriff is vacant in any county, the coroner thereof shall be bound to perform all the duties, and be vested with all the powers, of sheriff of said county." He does not cease to be coroner by the office of sheriff becoming vacant; on the contrary, he continues to be coroner, and as such performs the duties of sheriff during the vacancy in that office. If for any reason the office of coroner thereafter becomes vacant, then a vacancy occurs in the offices of sheriff and coroner, unless the *former* had been *previously* filled by an election ordered by the commissioners under the provisions of section 1208. But when not filled in this way, there is none the less a vacancy in the office of sheriff, because the duties of the office are performed by the coroner under the provisions of section 1219. This is apparent from the fact that it is competent to the commissioners to order it to be filled, although there may be no vacancy in the office of

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coroner, and that officer may be performing the duties of sheriff *pro hac vice*. The clause in section 1208 conferring this power on the commissioners reads as follows: "In case of vacancy in either office by death, resignation, removal, or permanent disability of the sheriff or coroner, if, in the opinion of the county commissioners, the public interest require it, they may . . . order a special election to fill the vacancy." Hence, in contemplation of the statute, a vacancy exists in the office of sheriff whenever the person elected or appointed as sheriff ceases for any reason to be sheriff, although its duties may for the time being be performed by a coroner acting as sheriff; as the power conferred is to order an election to fill a vacancy, if one occurs "in either office." But this language would be entirely inappropriate if no vacancy occurs in the office of sheriff, so long as there is an incumbent in the office of coroner required to perform the duties of sheriff under section 1219, Revised Statutes.

Writ refused.

SPEAR, J. I find myself compelled to dissent from the judgment rendered. The holding is that the case presented does not authorize the awarding of a writ of *mandamus*, because the relator has not shown that he is a party beneficially interested within the meaning of the statute; in other words, that to award the writ would be doing a vain thing. The evidence shows that each of the four political parties having organizations in the county of Stark, at their several nominating conventions, nominated a candidate for sheriff, one of them being the person who was then holding the office of coroner and *ex-officio* sheriff; that later, and before the election, he withdrew from the contest, and was not voted for at the election; that the other three continued in the field and were voted for, the relator receiving over seven thousand votes, many more than a majority of all the votes cast for sheriff, the total vote on the general ticket in the county being over fifteen thousand. The officers of the several election precincts,

save two, duly forwarded the returns to the clerk, as required by law, and there is no question but that the election was every-where legally conducted, the returns in due form, and no suspicion exists that any are false, forged, or fraudulent.

The statute regulating the manner in which the votes shall be canvassed requires that the clerk and two justices of the peace shall proceed to open the several returns made to the clerk's office, and make abstracts of the votes cast; that in making the abstracts they shall not decide on the validity of the returns, but shall be governed by the number of votes stated in the poll-book, and shall certify and sign the abstracts. The duty here enjoined the clerk refuses to perform. Such refusal prevents the relator from having a standing to prosecute an action in *quo warranto*, or other proper form, to contest with the occupant his right to the office.

I take the liberty, with due deference, of suggesting that the showing thus made presents a case of sufficient gravity to warrant the court in awarding a writ directing the clerk to perform the plain duty required by statute, and that such action would not be the doing of a vain thing. Nor, as I think, is the defendant in a position to ask the court, in this case, to anticipate the future, and determine what would be the result of a case between the relator and the occupant, should one be instituted. I am not aware that any member of the court doubts that it was the duty of the clerk to abstract and certify the returns for sheriff, and for one I am disposed to say so, and am content to delay deciding a *quo warranto* case until such time as such case may be brought. Believing that it is a tolerably proper thing for an officer to perform a sworn duty, I am of opinion that the making of the order prayed for would prove salutary, and that the purpose and policy of the law would be advanced by awarding the writ.

William M. Este v. William M. Wilshire *et al.*

WILLIAM M. ESTE v. WILLIAM M. WILSHIRE *et al.**Arrest—Civil action—Fraudulent obligation—Witness—Criminating questions—Revised Statutes, section 5492.*

ERROR to the District Court of Hamilton county.

Wulsin & Perkins and *C. B. Matthews*, for plaintiff in error.*Wright & Wright*, for defendant in error.

BY THE COURT. 1. The defendants, Wilshire & Thomas, were arrested at the suit of Este, upon an affidavit filed by him stating in substance that on July 26, 1882, he directed the said defendants, then acting as his brokers, to sell his stocks and account to him for the proceeds; that they thereupon at once sold the same, received the money, amounting to \$3,281.36 over and above all charges, and embezzled and converted the same to their own use.

Held, that thereby the defendants fraudulently incurred an obligation to their principal, the said Este, within the meaning of the fifth clause of section 5492 of the Revised Statutes, and warranted their arrest under the provisions of said section.

2. The defendants filed a motion to vacate the order of arrest, and for that purpose also filed their own affidavits, controverting the statements of the plaintiff's affidavit, and stating facts tending to exonerate themselves from the charge contained therein.

Held, that it was then competent to the plaintiff to examine them as to any thing relative to the charge, although it might tend to criminate them. A party can not, in such case, testify in his own behalf, and then refuse to answer questions on the ground that the answer will tend to criminate him.

Judgment reversed and cause remanded.

OWEN, C. J., dissents from the second proposition.

Slagle v. Entrekin.

SLAGLE v. ENTREKIN.

Administrator de bonis non—Effects and assets recoverable—Acceptance of resignation—Jurisdiction of probate court—Bond—Breach—Revised Statutes, section 6020.

1. The language "personal effects and assets of the estate unadministered," used in section 6020 of the Revised Statutes, includes the indebtedness of an administrator, resigned, to the estate on account of assets received and converted to his own use, as well as such "effects" and "assets" as remain in specie, and may be recovered by his successor in an action upon the administration bond.
2. By accepting the resignation of an administrator, pending the settlement of his accounts, the probate court does not thereby lose its jurisdiction over his person, or the settlement of his accounts, and may proceed to hear and determine exceptions thereto, and ascertain the amount due from him to the estate, in like manner, as if he had continued in the execution of his trust; and the amount so found due will, in the absence of fraud and collusion, be conclusive, not only upon him but upon his sureties, in an action upon the administration bond, unless an appeal has been taken, or the judgment has been reversed upon a proceeding in error.
3. Where, upon the settlement of the accounts of an administrator or executor, who has resigned or been removed, the amount due from him to the estate has been ascertained and determined by the probate court, it is not error, in the court, to order its payment to his successor in the administration of the estate.
4. The averment of a failure of an administrator or executor, who has resigned, to pay to his successor the amount found due from him on the settlement of his accounts, is a sufficient assignment of a breach of the condition of his bond "to administer according to law" the assets of the estate.
5. The omission of an administrator to give a bond with the requisite number of sureties upon it, will not affect his right to recover in an action where letters have been issued by the probate court upon the bond as given, and remain unrevoked.

ERROR to the District Court of Ross county.

M. J. Williams, for plaintiffs in error.

W. E. Evans and *John C. Entrekin*, for defendant in error.

By THE COURT. The action below was a suit by John C. Entrekin, administrator *de bonis non* of Jacob Slagle, deceased, upon the bond of his predecessors, Henry and

44	637
46	30
46	66
44	637
50	318
44	637
53	678
44	637
57	318
44	637
68	256
68	256
68	509

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Frank Slagel and their sureties, to recover the amount found due the estate on the settlement of their accounts in the probate court of the county.

On November 19, 1878, the executors filed their final account in the probate court, previous to which a number of accounts had been filed, none of which had, however, been settled. Exceptions were filed by one of the legatees, and a motion made to remove them for maladministration. During the pendency of this motion and the settlement of their accounts, they tendered their resignations, which were accepted by the court on August 29, 1879, and on the 1st of November, following, the court appointed Entrekin as succeeding administrator, who also filed exceptions to the account of his predecessors, the Slagels. Subsequently, the court having heard the exceptions, settled the account, and found that there was due the estate from the executors the sum of \$9,422, which it ordered to be paid "to John C. Entrekin, as administrator *de bonis non*, with the will annexed, of Jacob Slagel, deceased."

The breach of the bond assigned in the petition was the failure of said Slagels, on demand, to pay to said Entrekin, as administrator, etc., said sum of money, with interest.

The defendants, in their answers, averred that there was not the amount due from them as found by the probate court, and the sureties also denied the title of Entrekin as administrator.

No appeal was taken from the judgment and order of the probate court, and the same remain in full force and unreversed.

Evidence was offered on the trial, and ruled out, tending to show that there was not the amount due from the Slagels, as executors, as found by the probate court. There was, however, no averment in the answers of any fraud or collusion in the settlement of the account, nor was there any offer of evidence to that effect.

The court charged the jury that "the probate court had the power to accept the resignation of the executors, pending the final settlement of their accounts, and to appoint a

successor, as was done, without affecting its power and jurisdiction over the settlement of their accounts." And also that "the account as settled in the probate court is, as to the amount due, final between the parties to this suit; it being in full force and unreversed."

Various requests, intended to open up to the jury the question as to the accuracy of the finding and determination of the probate court as to the amount due from the executors at the time of their resignation, were made and refused by the court; to all which exceptions were duly reserved.

Held, 1. That under section 6020, Revised Statutes, an administrator or executor appointed to fill the place of one who has resigned or been removed, etc., is entitled to receive from the latter his indebtedness to the estate on account of assets received and converted to his own use; the language, "personal effects and assets of the estate unadministered," as used in this section, includes such indebtedness as well as such "effects" and "assets" as remain in specie, and he may maintain a suit against such former administrator or executor, and his sureties on his administration bond, and recover the same. Under our statute, the assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testator. *Tracy v. Card*, 2 Ohio St. 431; *Curtis v. Lynch, Admr.*, 19 Ohio St. 392; *Douglas v. Day*, 28 Ohio St. 175; *Casoni v. Jerome*, 58 N. Y. 321; *Balch v. Hooper*, 32 Minn. 158

2 That where an administrator or executor resigns, pending the settlement of his accounts, and his resignation is accepted, the court does not thereby lose its jurisdiction over his person, nor the settlement of his accounts, and may proceed to hear and determine exceptions thereto, and ascertain the amount due from him to the estate in like manner, as if he had continued in the execution of his trust. *Casoni v. Jerome, supra*.

3 That the amount found due from an administrator or executor to the estate on the settlement of his accounts in the probate court is, in the absence of fraud or collusion,

Slagle v. Entrekin.

binding not only upon him, but also upon his sureties, in an action upon the administration bond, unless an appeal has been taken or the judgment has been reversed upon a proceeding in error. *Casoni v. Jerome, supra*; *Braiden v. Mercer*, 44 Ohio St. 339; *Shroyer v. Richmond*, 16 Ohio St. 455; *Wehrle v. Wehrle*, 39 Ohio St. 365; *Todd v. Lewis*, 2 Handy, 281.

4. That where upon the settlement of the accounts of an administrator or executor, who has resigned or been removed, the amount due from him to the estate has been ascertained and determined by the probate court, it is not error, in the court, to order its payment to his successor in the administration of the estate. It is not an order of distribution, but a judgment in favor of the estate against him upon the settlement of his accounts for assets received and unadministered, and to which, under section 6020, Revised Statutes, the succeeding administrator is entitled. *Baleh v. Hooper, supra*; *Sanford v. Gilman*, 44 Conn. 461.

5. That the averment of a failure of an administrator or executor, who has resigned, to pay to his successor the amount found due from him in the settlement of his accounts, is a sufficient assignment of a breach of the condition of his bond "to administer according to law" the assets of the estate. Rev. Stats., secs. 6020, 6214; *Luce v. Treasurer, etc.*, Wright, 655; *Gutridge v. Vanatta*, 27 Ohio St. 366; *O'Conner v. State*, 18 Ohio, 226.

6. It was disclosed by the evidence in the case that there is but one surety on the bond of Entrekin; the statute requires two. A bond should not be accepted with less than the required number of sureties upon it; and he may be required, at any time, to give a proper bond, if it has not heretofore been done. But the omission to give a bond with the requisite number of sureties upon it can not defeat his right to recover in this action, so long as the title conferred by his letters from the probate court remains unrevoked. It is voidable, but not void, and can not therefore be collaterally impeached. *Schouler Exr.*, § 142, and cases cited; *Bigelow v. Comegys*, 5 Ohio St. 256.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO.
JANUARY TERM, 1887.

HON. SELWYN N. OWEN, CHIEF JUSTICE.
HON. FRANKLIN J. DICKMAN,
HON. WILLIAM T. SPEAR,
HON. THAD. A. MINSHALL,
HON. MARSHALL J. WILLIAMS. } *Judges.*

RATTERMAN v. THE STATE.

Dow law liquor tax—Duty of county treasurer to pay funds to city treasurer—Act of May 14, 1886.

In a suit brought by a city treasurer against a county treasurer to require him to pay over moneys collected by him as taxes under the act of May 14, 1886, entitled "An act providing against the evils resulting from the traffic in intoxicating liquors," an answer which alleges that such "money was paid under protest and to avoid the distraint provided by said law," does not state a defense; and in such case it is the duty of such county treasurer to pay over money so collected, according to law.

ERROR to the Circuit Court of Hamilton county.

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Ratterman v. The State.

Rufus B. Smith, county solicitor, for plaintiff in error.

Coppock, Cox & Gallagher, city solicitors, for defendant in error.

BY THE COURT. Error is prosecuted here by the treasurer of Hamilton county against the state on relation of the treasurer of the city of Cincinnati, to reverse the judgment of the circuit court of Hamilton county awarding a writ of peremptory *mandamus*.

It appears by the petition in the court below that the relator is the treasurer of the city of Cincinnati, and the defendant the treasurer of Hamilton county. As such treasurer the defendant, previous to and on the 20th day of December, 1886, collected from persons carrying on the business of trafficking in intoxicating liquors a large amount of money under the provisions of the statute passed May 14, 1886, entitled "An act providing against the evils resulting from the sale of intoxicating liquors." Under the provisions of that act, three-fourths of the money so collected is payable to the treasurer of the city of Cincinnati. On the 30th day of December, 1886, the auditor of Hamilton county, at request of relator, drew his warrant on the treasurer of Hamilton county (defendant), for the sum of one thousand dollars, a sum much less than two-thirds of the amount which would be payable to the city from the sum so collected. This warrant was presented to the defendant and payment demanded, which was refused.

The answer admits the collection, on and before the 20th of December, of an amount not less than four hundred thousand dollars, and sets up a defense that "all of said money was paid under protest and to avoid the distraint provided by said law; that in many cases the protests were in writing, and in others they were verbal; that no grounds for said protests were given, and defendant does not know in any case what the ground of protest is; that he believes in many cases said ground of protest is the unconstitutionality of said law, but whether it is the sole ground in any

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case, and if so in what cases, he is unable to state, and has no means of knowing."

To this answer the relator demurred.

The answer is clearly insufficient. Waiving the objection that it does not contain facts showing that the payments were involuntary, another objection exists which is fatal to the pleading. The defendant is sued in his official capacity as treasurer. He admits that as treasurer he made the collection of taxes. The money thus obtained was, therefore, in the treasury. The defendant makes the objection that he can not safely pay over the money because he will be liable to suits in his individual capacity on the part of the protesting tax-payers, and must retain the money until such liability is determined. The tax-payer has one year in which to sue, and the cause may remain undisposed of an indefinite time. This claim is without merit.

The law (see sections 1115 to 1128, Revised Statutes) makes it the duty of the county treasurer on or before the 15th day of February, and on or before the 10th day of August of each year, to settle with the auditor for all taxes collected at the time of making such settlement, and immediately after each settlement, on demand and presentation of proper warrant, pay to the township treasurer, city treasurer, or other proper officer, all moneys in the county treasury belonging to any township, city, village, hamlet, or school district. And when the local authorities so request, the auditor may draw, and the treasurer shall pay, on such draft to township or city treasurers, any sum not exceeding two-thirds of the current collection of taxes for such local authorities respectively, in advance of the semi-annual settlement. If the treasurer fails to make any settlement required by law, or to pay over any money at the time and in the manner required by law, suit shall be instituted against him and his sureties for the amount due and ten per cent penalty, and the commissioners may then forthwith remove such treasurer and appoint some person to fill the

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vacancy. And such treasurer, on such removal, shall deliver to his successor all moneys, books, papers, and other property in his possession as treasurer.

Having received this money as treasurer, the defendant must pay it out according to law. Any other course on the part of county treasurers would work infinite embarrassment to the state and to the several counties, municipalities, townships, and school districts entitled to portions of the public moneys. They might be left without funds during the litigation, and the administration of the public affairs be greatly, if not wholly, obstructed, while the money to which they were entitled was lying idle in the hands of the treasurer subject to the perils as to safety incident to such situation. *O'Neill v. Commissioners*, 27 Md. 240; *Smyth v. Titcomb*, 31 Me. 272; *Evans v. Trenton*, 24 N. J. Law (4 Zab.), 764; *San Francisco v. Ford*, 52 Cal. 198.

If the duty to pay over, notwithstanding the possibility of being held personally for taxes paid under protest, works a hardship on the treasurer, it is one which he must be held to have anticipated. He took the office voluntarily. Office-holding is not compulsory. If a treasurer so circumstanced finds the risks of the position too great or the burdens too heavy there is no legal obstacle in the way of his avoiding the one and relieving himself of the other by a resignation.

The demurrer was properly sustained.

Judgment affirmed.

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44 645
50 730*Dower—Foreign divorce for aggression of husband—Subsequent marriage.*

1. A woman divorced *a vinculo* by reason of the aggression of her husband, within the meaning of the act entitled "an act concerning divorce and alimony," passed March 11, 1853, who subsequently marries another man during the life of her first husband—if she survive the latter—will be entitled to dower in the real estate of which the first husband was seized at any time during the coverture. *(act of March 11, 1853, & Rem. Code)*
2. Where husband and wife were actually domiciled in the state of California, and the wife, by reason of the aggression of her husband within the meaning of the act of March 11, 1853, was there divorced from him by a competent tribunal, having jurisdiction of both parties, and of the subject-matter of the action, upon surviving him she became entitled to dower in his real estate in Ohio, of which he was seized during the coverture, although, after the decree of divorce and during his life, she had by marriage become the wife of another man. *Civil*
3. In an action brought by the wife for divorce in a court in California, she alleged among other things in her complaint, that on account of ill-treatment by her husband she had been compelled to leave him, and had never since lived or cohabited with him; and that continuously, for more than three years last past, he had been and then was habitually intemperate. The court found as facts, that the wife by reason of the husband's intemperance and cruel treatment, had been compelled to leave him; that for more than two years immediately preceding the filing of her complaint, the husband had been guilty of habitual intemperance; and it appearing to the court from the testimony in the case that all the material allegations in the complaint had been sustained and established, a divorce from the bonds of matrimony was decreed to the wife. *Held*, that the wife was divorced by reason of the aggression of her husband, within the meaning of the Ohio statute of March 11, 1853. *11*

APPEAL, reserved in the District Court of Trumbull county.

On the 5th day of October, 1877, Olive McGill, wife of Lot McGill, filed her petition in the court of common pleas of Trumbull county against the defendant in error, Ransom L. Deming and others, claiming dower in one hundred and seventy acres of land situated in the township of Vienna in that county. Judgment was rendered by the court of common pleas against the plaintiff, dismiss-

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ing her petition, and an appeal was thereupon taken by her to the district court.

At the March term, 1884, of the district court, the cause came on for trial upon petition, answer, and reply, and the court, upon the cause being submitted, found the facts to be as follows:

On the 24th day of March, 1836, Olive McGill—then Olive Tyler—was joined in marriage to one Jacob Barnhisel, both then residing in the county of Trumbull, and state of Ohio. They continued there to reside until the year 1852, when they removed to the state of California, and there resided until their respective deaths—Jacob Barnhisel dying in the month of April, 1872, and Olive McGill dying after the commencement of this action.

In the year 1835, Jacob Barnhisel became seized in fee-simple of the land in which Olive McGill claims dower, and so remained seized until the 4th day of September, 1852, when such land, pursuant to a sale upon execution, was conveyed by the sheriff of Trumbull county to one John W. Powers, under whom the defendant, Ransom L. Deming, acquired title to such land, and held the same at the commencement of this action.

On the 25th day of March, 1871, Olive Barnhisel commenced, in the district court of the 15th judicial district of the state of California, a court of competent jurisdiction in matters of divorce, her action against Jacob Barnhisel for a divorce, by reason of the aggression of her husband, alleging in her complaint as follows: "That in 1855, on account of the constant intemperance of the defendant and his ill-treatment, plaintiff was compelled, and did, leave him, and has never since lived or cohabited with him; that continuously, for more than three years last past, defendant has been, and now is, habitually intemperate, and, by reason of such intemperance, has been all that time, and still is, incapable of attending to his ordinary affairs in business." Jacob Barnhisel was personally served with summons to appear in the action and answer the complaint filed therein.

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The court, on final hearing, found as facts: 1st. That more than twenty years prior thereto, the plaintiff and defendant were lawfully married to each other, and ever since had been husband and wife. 2d. That the plaintiff and defendant were continuously, for more than six months immediately preceding the filing of the complaint, residents of California. 3d. That the plaintiff, by reason of the defendant's intemperance and cruel treatment, was compelled to leave him. 4th. That the defendant, for more than two years immediately preceding the filing of the complaint, was guilty of habitual intemperance. And, it appearing to the court, as set forth in the final decree, that all the material allegations of the complaint had been sustained and established, by testimony free from all legal exceptions as to its competency, admissibility, or sufficiency, the court on the 15th day of September, 1871, ordered, adjudged, and decreed that the marriage between Olive Barnhisel and Jacob Barnhisel be dissolved, and that the parties and each of them be freed and absolutely released from the bonds of matrimony existing between them, and from all the obligations thereof.

At and during all the time of the proceedings and judgment of divorce it was provided by the statutes of California as follows:

"Section 5092. Divorces may be granted for any of the following causes: . . . 2. Extreme cruelty. . . . 5. Habitual intemperance."

"Section 5106. Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon an innocent party."

"Section 5107. Habitual intemperance must continue one year before it is a ground of divorce."

The action was duly conducted under and according to the provisions of the laws of the state of California, and the

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decree of divorce remained and was in full force from the rendition thereof during all the life-time of Olive McGill and Jacob Barnhisel and thereafter.

After the decree of divorce, and before her request to have dower assigned to her, and before the commencement of her action for dower, Olive Barnhisel intermarried with one Lot McGill, and on the second day of October, 1877, duly requested to have dower assigned to her in the one hundred and seventy acres of land described in her petition, which was then and there refused.

At the March term, 1883, of the district court, the death of Olive McGill was suggested, and her administrator, F. D. McLain, was made party plaintiff in the action.

Upon the facts so as aforesaid found, the court were unanimously of opinion that difficult and important questions of law had arisen for determination, to wit:

1. Whether, upon the facts aforesaid, Olive McGill, at the time of commencing this action, was entitled to have dower assigned to her in the premises described in the petition.

2. Whether Olive McGill, either at the time of so requesting assignment of dower to her, or at the time of commencing this action, was the widow of Jacob Barnhisel, within the meaning of the act of the general assembly of Ohio, entitled an act relating to dower, as amended by an act passed March 27, 1858, entitled "An act to amend an act entitled an act relating to dower," passed January 28, 1823 (1824.)

3. Whether Olive McGill was divorced from Jacob Barnhisel for his aggression, within the meaning of the seventh section of the act of the general assembly of Ohio, entitled "An act concerning divorce and alimony," passed March 11, 1853.

4. Whether the administrator of Olive McGill is entitled to relief in this action.

And on motion of both parties thereto, it was, by the unanimous opinion of the court, ordered that the cause,

upon the facts aforesaid and the pleadings therein, be reserved for decision and judgment in the supreme court of this state.

Hutchins, Campbell & Johnson, for plaintiff.

The answer is probably intended to assert, as matter of law, that the plaintiff, although lawfully divorced in the state of California for an aggression of the husband, recognized as ground for divorce in that state, is not entitled to dower in land in Ohio, unless the ground was such that she would have been entitled to a divorce in Ohio. But this claim is untenable. If "aggression," in our statute, means only an Ohio aggression, or a fault which the Ohio statute defined to be an aggression for which a divorce might be granted, then the word divorce, used in the same section, must mean a divorce granted under the laws of Ohio by the courts of Ohio.

But the statutory provision protecting the dower rights of the wife is broader than the provision defining the causes for which divorces may be granted. The former is intended to apply to dower in lands in Ohio, whether a resident of the state or not. The language is general and not limited to divorces granted in this state. If a divorce be granted for an aggression of the husband, which is made a ground of divorce in any state where granted by a court of competent jurisdiction, having jurisdiction of the parties, the wife shall not be barred of her dower in the lands of her husband situate in this state, and she shall have all the privileges and immunities in reference to her title to lands in Ohio, by virtue of her marital rights, which are granted to a married woman, a citizen of Ohio, lawfully divorced by the courts of this state.

The constitution of the United States provides, article 4:

"Section 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. . . .

"Section 2. The citizens of each state shall be entitled to all privileges and immunities of the several states."

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See construction of these provisions in *Slaughter-House Cases*, 16 Wall. 36.

Hence the divorce granted in California, where the court had full jurisdiction of the parties and subject-matter, is valid here. *Cheever v. Wilson*, 9 Wall. 108.

The plaintiff was entitled to dower in the lands of her husband in Ohio, notwithstanding the foreign divorce. *Gould v. Crow*, 57 Mo. 200; *Harding v. Alden*, 9 Me. 140.

George M. Tuttle, for defendant.

The right to dower in the state of Ohio is limited and defined by statute. *Rice v. Lumley*, 10 Ohio St. 596.

At common law a divorced woman was not entitled to dower. "She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed. 2 Black. Com. 130; Co. Litt. 32a; Com. Dig. Tit. Dower, A. 2.

There are two statutes in Ohio, by the limitations of which the right of dower is defined, and by one of these the right of the demandant is conferred, if it exists.

The first of these is the act entitled "an act relating to dower," passed January 28, 1824. 1 S. & C. 586.

So far as this statute confers the right of dower, it is limited to "the widow of a person dying."

Upon the granting of the divorce in California the demandant ceased to be the wife of Jacob Barnhisel. *Cox v. Cox*, 19 Ohio St. 510; *Van Fossen v. The State*, 37 Ohio St. 318.

It was expressly held in *Rice v. Lumley*, 10 Ohio St. 596, that "dower is provided for by statute in Ohio, and is only allowed to the widow who was the wife of the person dying, at the time of his death."

In *Lamkin v. Knapp*, 20 Ohio St. 454, the question was whether, after a decree of divorce, obtained by the demandant under the statute of 1840, and her subsequent marriage before the decease of the divorced husband, she was still entitled to dower. It was held that she was; but that her

title was by virtue of the statute regulating divorces, and not the statute of dower.

That a woman divorced from her husband is not his widow, was held *arguendo* in *Charlton v. Miller*, 27 Ohio St. 298, 305.

But the petitioner is supposed to have rested her claim to dower upon section seven of the act concerning divorce and alimony. 1 S. & C. 502.

The determination in the divorce cause in California inculpated the defendant in the charge only of habitual intemperance for one year. Was this divorce a divorce for the aggression of the husband within the meaning of the statute in question?

Upon the most obvious principles of construction, it is evident that the provisions of section seven of the divorce act have direct reference to divorces under the laws of this state.

Not only is this view required by the principle that each portion of a statute shall be construed by its context, by the subject-matter of the whole, and by its general design, but reasons still more decisive are afforded by the section in question. Every one of its integral provisions, unless it be this, is an express direction to the courts, who may grant the divorces in question. And even this clause is qualified by a limitation which implies that in the very proceeding to which the effect relied upon is given, the whole of the land might be given as alimony. It is also evident that the term aggression, in the clause relating to the husband, is used in the same sense as in that relating to the wife. The clause relating to the wife expressly is a direction to the court granting the divorce.

This view was very decisively applied by Hitchcock, J., in *Mansfield v. McIntyre*, 10 Ohio, 27, 30, to the sixth section of the act which governed that case. It is equally applicable here, and, unless the authority of that case can be questioned, it is decisive here.

If these views are correct, a divorce in California on the ground of habitual intemperance for one year is not a di-

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vorce for the aggression of the husband within the meaning of section seven of the act concerning divorce and alimony. It is not, although the aggression may be a ground of divorce under the statute of California. It is not, though a divorce may have been granted for that cause under a statute in the courts of that state.

DICKMAN, J. Wherever the common law has obtained, the estate of dower has been recognized as an existing institution. It has, however, been so regulated and modified by positive law that it would seem to be solely a creature of the statute. The claim for dower, under consideration, derives its main support from statutory provisions.

Under the act of 1824, "concerning divorce and alimony" (29 Ohio L. 431), although it contained no express provision in regard to the assignment of dower when the divorce was obtained by the wife, the doctrine was pronounced in *Mansfield v. McIntyre*, 10 Ohio, 27, that if the divorce be decreed in consequence of the aggression of the husband, the wife would not be barred of her right of dower, but, upon the death of her husband, might enforce that right in the same manner she might have done, had she continued to live with him until the day of his death. A divorced wife was regarded by the court as the widow of her former husband after his decease, and, as such widow, entitled to dower by virtue of the act of January 28, 1823 (1824), "relating to dower," which provided "that the widow of any person dying shall be endowed" of all the lands, of which he was seized as an estate of inheritance, at any time during the coverture. But, in *Rice v. Lumley*, 10 Ohio St. 596, it was the judgment of a majority of the court that dower is only allowed to the widow who was the wife of the person dying at the time of his death; and that a woman, who, under the act of 1824, concerning divorce, had obtained a divorce *a vinculo matrimonii*, from her husband for his misconduct, and by subsequent marriage had become the wife of another person, if she survived her first husband, was not his widow at the

time of his decease, within the terms of the act relating to dower, and was not dowerable of his real estate.

The provision "that the widow of any person dying shall be endowed" was retained in the act of March 27, 1858 (55 Ohio L. 24), amending the aforementioned act, relating to dower; but the act of 1824, concerning divorce, was repealed by the act of 1840 (38 Ohio L. 37). Section five of the act of 1840 specially provides for the wife's dower, where a divorce is granted for the aggression of the husband, and enacts that, if in such case the wife survive her husband, she shall be entitled to her right of dower in his real estate of which he was seized during the coverture. The case at bar comes within the purview of the "act concerning divorce and alimony," passed March 11, 1853 (S. & C. 509), the seventh section of which, in all that pertains to the subject of divorce, is in the same words with section five of the act of 1840, which the act of 1853 repealed, and reads as follows:

"Section VII. That where a divorce shall be granted, by reason of the aggression of the husband, . . . if the wife survive her husband, she shall also be entitled to her right of dower in the real estate of her husband, not allowed to her as alimony, of which he was seized at any time during the coverture, and to which she had not relinquished her right of dower; but if the divorce shall arise by reason of the aggression of the wife, she shall be barred of all right of dower in the lands of which her husband shall be seized at the time of the filing of the petition for divorce, or which he may thereafter acquire, whether there be issue or not."

In the case of *Lamkin v. Knapp*, 20 Ohio St. 454, that portion of section five of the act of 1840 came under consideration which provided that "where a divorce is granted by reason of the aggression of the husband," in addition to alimony, "if the wife survive her husband, she shall also be entitled to her right of dower;" and it was held that, by virtue of this provision, the marriage of the wife, after divorce, to another person, during the life of her first hus-

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band, did not bar her right of dower, and if she survived her first husband she became entitled to be endowed of the real estate of which he was seized during the coverture. Although after divorce she might not be his widow within the terms of the statute relating to dower, yet, if she survived him, the right of dower would be preserved to her by the terms of the statute concerning divorce. The word "wife" was used to designate the person who had been divorced for the aggression of the husband, and in the event of surviving him dower was to be assigned to her whether she had married or remained unmarried. Survivorship was the only condition annexed by the statute.

In the light of adjudication and statutory interpretation, it is manifest that had Olive Barnhisel been divorced from her husband by a tribunal of this state, by reason of his aggression, she would, upon her surviving him, have been dowerable of the one hundred and seventy acres of land of which the defendant in error claims the ownership, notwithstanding her intermarriage with McGill after the divorce and during the life-time of her first husband. This right would have inured to her, not by virtue of the act relating to dower, which endows "the widow of any person dying," but under the provisions of the act concerning divorce.

It is contended, however, that the divorce of Olive Barnhisel was not granted by reason of the aggression of her husband within the meaning of the act of March 11, 1853: first, because his misconduct was not equivalent to the aggression contemplated by that statute; and second, because that statute was applicable only to divorces decreed by our own courts

Among the causes of divorce declared by our own statute were extreme cruelty and habitual drunkenness for three years; and during all the time of the proceedings for divorce instituted by Olive Barnhisel, it was provided by the statutes of California that divorces might be granted in that state for extreme cruelty, and habitual intemperance which had continued one year. It is shown in the

finding of the facts by the district court that in the divorce proceedings in California, Olive Barnhisel alleged in her complaint that in 1855, on account of ill-treatment by her husband, she had been compelled to leave him, and had never since lived or cohabited with him. She furthermore alleged that continuously, for more than three years next preceding, he had been habitually intemperate, and by reason of such intemperance had been all that time and then was, incapable of attending to his ordinary affairs or business. The cause having been referred to a commissioner, to take the proofs as to the matters and things set out in the complaint, and the commissioner having made his report, the court found among other facts that Olive Barnhisel, by reason of her husband's intemperance and cruel treatment, had been compelled to leave him, and that for more than two years immediately preceding the filing of the complaint in the case, he had been guilty of habitual intemperance. And the final decree of divorce was pronounced, as therein set forth, upon its appearing to the court that all the material allegations of the complaint had been sustained and established by testimony free from all legal exceptions as to its competency, admissibility, or sufficiency. It is presumable that our district court based its finding of facts in reference to the divorce upon the record and judicial proceedings of the court in California, as duly authenticated in accordance with the act of congress. The decree of divorce was rendered for the cause of cruelty, and habitual intemperance for more than two years. For aught that appears the habitual intemperance had continued for three years and more. One of the material allegations of the complaint being that Jacob Barnhisel continuously for more than three years had been habitually intemperate, and the court having found all such allegations to have been sustained, we think that his cruelty and habitual intemperance constituted an aggression, within the meaning of the act of 1853, adequate to entitle his divorced wife to dower in his lands.

But the question arises whether the divorces referred to in

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section seven of the act of 1853 include those that are decreed by courts of states other than our own, and whether the divorce granted in California to Olive Barnhisel should have availed her in maintaining her claim for dower in the real estate situated in Ohio. Jacob Barnhisel and wife, at the time they were divorced, were and had been domiciled in California for over eighteen years. It was there that the dereliction of duty and acts of aggression occurred for which the divorce was granted to his wife. The case was not, therefore, one of removal from this state to evade the operation of our own divorce laws. The court pronouncing the decree of divorce had acquired unquestioned jurisdiction of both parties and of the subject-matter of the action. Indeed, no tribunal in any other state could, at the time, have properly taken cognizance of the action. It is a rule dictated by reason and justice, and grounded in public policy and convenience, that the courts of a country where both parties are domiciled may adjudicate in regard to the validity, continuance, or dissolution of the marriage relation. And it is now firmly held that where parties are actually domiciled in the country, and a sentence of divorce is pronounced between them by a competent tribunal, having jurisdiction over the case, the sentence is valid and ought to be held every-where a complete dissolution of the marriage, in whatever country it may have been originally celebrated. Story Conf. Laws, § 597. It is, therefore, the settled doctrine, that a judgment of divorce granted by the courts of one state, and valid there by the local laws of such state, is valid in every other state in the Union, if the respondent was duly and actually served with process, or appeared voluntarily and submitted to the jurisdiction. *Cheever v. Wilson*, 9 Wall. 108.

The constitution of the United States requires that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings in every other state." And, by act of congress, such records and judicial proceedings, when duly authenticated, are to have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the

state from whence such records are or shall be taken. It is well settled that these provisions apply to judicial proceedings in cases of divorce as well as in other causes.

A judgment in an action for divorce is in the nature of a judgment *in rem*. It determines the question of marriage relations, or of personal *status*, as against all the world, and is, therefore, conclusive, not only upon the parties litigating in the cause, but upon strangers. 1 Greenlf. Ev., § 525; 1 Stark. Ev. 288. Such a judgment is as conclusive upon Deming, the defendant in error, as it would have been upon Jacob Barnhisel, if his wife, after the divorce, had commenced proceedings against him in this state for alimony.

It is said in *Cox v. Cox*, 19 Ohio St. 511, that the principle, upon which rests the validity of decrees of divorce granted by the tribunals of other states, does not require that they should be allowed to operate in the foreign jurisdiction beyond the dissolution of the marriage. But it may with reason be also said that justice between the parties does not require that such divorces shall, in all cases, have no effect upon property except in the forum where they are decreed. While it is a principle of general recognition that real or immovable property ought to be left to be adjudged by the law of the place where the property is situated, as not within the reach of extra-territorial law, it is not inconsistent with this principle to accord to a foreign divorce the same effect upon real property located beyond the forum of the decree, that is given to divorces of the same class decreed within the jurisdiction where such property is situated. In considering the incidents to a foreign divorce Judge Story says: "In respect to real or immovable property, the same effects would in general be attributed to such divorce as would ordinarily belong to a divorce of the same sort by the *lex loci rei sitæ*. If a dissolution of the marriage would there be consequent upon such a divorce, and would there extinguish the right of dower . . . according to such local law, then the like effects would be attributed to the foreign divorce which

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worked a like dissolution of the marriage." Confl. Laws, § 230e. And so, upon the same principle, if a right of dower, according to such local law, would accrue upon the granting of a divorce by a local tribunal, the like effect would follow a foreign divorce of the same sort decreed by a competent tribunal. The foreign divorce would not be recognized as exerting an extra-territorial force, *proprio vigore*, but would owe its effect rather to its conformity to the law of the place where the real property might be situated. A divorce granted to the wife by reason of the aggression of her husband by a competent court in California—both parties being there domiciled in good faith—would thus, in a claim of dower in Ohio lands, have a like effect with a divorce for an aggression of the same sort decreed by one of our own courts.

Our attention is called to the case of *Mansfield v. McIntyre*, *supra*, an application for dower after divorce granted to the petitioner's husband. The act of 1824, concerning divorce and alimony, provided that when the cause of divorce arose from the aggression of the wife she should be barred of her right of dower. John Mansfield, the husband of the plaintiff, procured an *ex parte* divorce from her in Kentucky, because of her continued absence from him for a long period of time. What was the cause of this separation is not shown, but, according to the statement of facts in the case, it was probably by mutual agreement of the parties. The court held that the decree of divorce pronounced in Kentucky did not bar the plaintiff's right of dower in lands lying in Ohio. It is not shown that the cause for granting the divorce in Kentucky was such an aggression of the wife as would have been sufficient, if committed in this state, to bar her dower within the meaning of our statute. There seems to have been a defective or ambiguous record of the proceedings in divorce in Kentucky, and Hitchcock, J., in delivering the opinion, said: "By our law, when a divorce is decreed, both parties are absolved from the obligations of the marriage contract. In

looking into the decree in the present case, however, I find that, although John Mausfield is divorced from his wife, she is not, in terms, released from any of her obligations to him. For aught that appears in the decree she still continued to be his wife." Under such circumstances, the court could not have been expected to make the decree pronounced in Kentucky a basis for refusing the application for dower. But these circumstances find no counterpart in the case under consideration; and the Kentucky divorce for the alleged aggression of the wife can not stand on the same plane with the California divorce for the aggression of the husband.

In construing the words in section seven of the act of 1853, "where a divorce shall be granted by reason of the aggression of the husband," it will be observed that the language of the statute is not limited to divorces decreed in Ohio, but is general, and may embrace divorces decreed in any other state. In the case of *Harding v. Alden*, 9 Greenlf. (Me.), 140, a husband deserted his wife in the state of Maine and went into North Carolina, and she removed into Rhode Island. Afterward he committed adultery in North Carolina, for which cause he was divorced from the bonds of matrimony by the supreme judicial court of Rhode Island, he having been personally cited to appear, but refusing so to do. It was held that the divorce was valid; and that the wife was entitled to dower in the lands held by the husband in the state of Maine during the coverture, in the same manner as if they had both continued to reside in Maine, and the divorce had been there decreed. The court say: "If the divorce decreed in Rhode Island is valid here, the remaining question is, whether the wife was thereupon entitled to dower in any estate of inheritance of which the husband was seized during the coverture. The statute allows it in the lands of the husband where a divorce is decreed for the cause of adultery committed by the husband, to be assigned in the same manner as if he were dead. The language is general, and is not limited to divorces decreed within the state." The doctrine of this

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case in reference to dower is, we think, in harmony with our own statute. We see nothing in the seventh section of the statute incompatible with extending its provisions to the case of a wife divorced from her husband in another state, and nothing to indicate that it was the intention of the legislature to restrict its provisions to divorces granted only by our own tribunals. It was not, we think, the legislative intent, and it would do violence to the spirit of the statute, if the husband could remove with his wife to another state, leaving the bulk of his property behind, and after there becoming domiciled could, by maltreatment or misconduct, force his wife to obtain a divorce, and thereby deprive her of her dower in his real estate in Ohio. Such a construction of the statute, as would enable the husband thus to act in fraud of the rights of the wife, could not have entered into the legislative mind.

By virtue of coverture and seizin of the inheritance in her husband, Olive Barnhisel acquired inchoate dower in his real estate—a valuable vested right or interest in his lands—which, though contingent, became consummate upon her surviving him, and entitled her to an assignment of dower in such lands. Under the statute, her right of dower might have been barred by jointure, or by leaving her husband and dwelling with another man in a state of adultery; or it might have been extinguished by deed, or in some other statutory mode, but it could not have been defeated by any separate act of the husband during coverture. The divorce by reason of the aggressive acts of her husband, decreed by a competent tribunal in California, did not work a forfeiture of her right of dower; and no act of her own, before or after the decree of divorce, is disclosed in the record, that would cause a forfeiture or divestiture of her dower in the real estate of which Jacob Barnhisel was seized during the coverture.

During the pendency of the action in the district court, Olive McGill having died, her death was suggested, and her administrator, F. D. McLain, was made party plaintiff; and the question arose, whether such administrator was entitled

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to relief in the action. Before the passage of the act of February 12, 1863 (60 Ohio L. 10) proceedings by the widow for an assignment of dower were abated by her death, and in such case, there could be no revivor. But under section 5711 of the Revised Statutes, as under the act of 1863, in the event of the widow's death before the assignment of her dower or before entry of the final judgment, the action may be revived in the name of her executor or administrator; and a decree may be rendered for a sum equal to one-third of the rental value of the real estate, of which she would have been dowable had she lived, from the time of filing her petition until her death, after deducting one-third of the necessary expenses.

In conformity with these views, we think a judgment should be entered for the plaintiff.

Judgment accordingly.

44	661
52	100
52	450

SENIOR v. RATTERMAN.

Constitutional law—Act of May 14, 1886—Dow law—Application to wholesale liquor dealers.

1. Section 18 of the schedule to the constitution, which provides that "no license to traffic in intoxicating liquors shall hereafter be granted in this state; but the general assembly may, by law, provide against evils resulting therefrom," applies as well to the wholesale as to the retail traffic in intoxicating liquors.
2. Wholesale dealers in intoxicating liquors, who are not manufacturers, are within the terms of the act of the general assembly passed May 14, 1886, entitled "An act to provide against the evils resulting from the traffic in intoxicating liquors," and are liable to the tax therein imposed.
3. Said act, as applied to wholesale dealers in such liquors, is not in conflict with section 2, of article 12, of the constitution, which provides that "laws shall be passed taxing by a uniform rule all moneys," etc., nor with section 26, of article 2, of the constitution, which provides that "all laws of a general nature shall have a uniform operation throughout the state."

MOTION for leave to file petition in error to the Superior Court of Cincinnati.

Follett, Hyman & Kelly, for the motion.

I. Wholesale dealers are not included in the provisions of the Dow law.

By the application of any fair rules of construction the term "traffic in intoxicating liquors," as used in section 18 of the schedule to the constitution, does not embrace wholesale dealers in intoxicating liquors. Regulation of the traffic can, in no proper sense, be held to apply to sales in large quantities.

The evils contemplated, and against which the legislature may by law provide, are the evils consequent upon the retail trade, the sale of intoxicating liquors as a beverage, and to be drunk on the premises where sold. Judge McIlvaine, in announcing the opinion of a majority of the court in *The State v. Frame*, 39 Ohio St. 399, 410, used the following language: "Undoubtedly the evils contemplated by the constitution, as resulting from the traffic in intoxicating liquors, are those which result from the sale and use of such liquor as a beverage."

The sale and use as a beverage, it must be admitted, is selling at retail, by the drink, and to be drunk where sold.

"The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." Cooley Const. Lim. 68.

The history of the legislation of this state, both before and since the adoption of the present constitution, prior to the year 1882, shows conclusively that the intent of the people in adopting section 18 of the schedule was to apply its operations to the retail trade. No attempt prior to that time had ever been made to license, restrict, restrain, control, or in any way regulate the wholesale trade. Upon this proposition the reasoning of Judge Okey, in his dissenting opinion in *State v. Frame*, *supra*, 421, is unanswerable: "The evil supposed to exist, and against which the consti-

tutional provision was directed, was the sale, by *any* person, of spirituous liquors by the drink, for that was the license, and all there was of it—that was the privilege, and the only privilege with respect to liquors, secured by such license. And this being true, it is too clear for argument that if it was sought by such constitutional provision to cut off such privilege to the few, much more was it intended to absolutely deny it to the many.” And again, on page 422, in considering “the condition of the statutes in relation to the traffic in liquors, in force in 1883,” he said: “The leading and far most important statutory inhibition then in force was the provision which was directed against the sale of spirituous liquors by the drink. By force of that provision, which had retained substantially the same form during our entire existence as a state, and a portion of our existence as a territory—a period, indeed, of more than ninety years—it was a crime, and punishable as such, for any one not licensed to sell spirituous liquors by the drink.”

“In construing a statute, aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted.” *Platt v. Union Pacific R. Co.*, 99 U. S. 48.

“That construction of a statute should be adopted which, without doing violence to the fair meaning of the words used, brings it into harmony with the constitution.” *Grenada County Supervisors v. Brogden*, 112 U. S. 261; *Bloodgood v. M. & H. R. Co.*, 18 Wend. 9; *Bailey v. Railroad Co.*, 4 Harrington, 389.

Adopting familiar and well established rules for the construction of statutes, and for the purpose of bringing this statute into harmony with the constitution, it is necessary to read the last part of section 8, as follows: “But such phrase does not include the manufacturing of intoxicating liquors from the raw material, or the sale thereof in quantities of one gallon or more at any one time.”

So read and construed, the statute accomplishes the purposes designated by its title, to wit, “to provide against the evils resulting from the traffic in intoxicating liquors,” as

such evils were defined by this court, as known and understood by the legislature at the time it was passed; relieves it of its unjust and unconstitutional discrimination and want of uniformity; does no violence to the language used; effectuates the intention of the legislature as gathered from the act, and brings it into harmony with the constitution. Thus read the legislature is relieved of the absurd position that there is no evil in manufacturing intoxicating liquors from the raw material, and none in the sale of the same by the manufacturer in quantities of one gallon or more at any one time, but that a sale in like quantity by any one other than the manufacturer is an evil.

The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed. A statute is to be interpreted, not only by its exact words, but also by its apparent general purpose. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. *United States v. Freeman*, 3 How. 556; *United States v. Kirby*, 7 Wall. 482; *United States v. Saunders*, 22 Wall. 492; *Preston v. Drew*, 33 Me. 558; *Henderson v. Mayor*, 92 U. S. 259; *Burgett v. Burgett*, 1 Ohio, 479; *Corwin v. Benham*, 2 Ohio St. 36; *Stetson v. City Bank*, 2 Ohio St. 167; *Rezner v. Hatch*, 2 Handy, 42; *Medical College v. Zeigler*, 17 Ohio St. 52; 48 Am. Dec. 573.

The evils against which the general assembly intended to provide was the sale of intoxicating liquors in quantities of less than one gallon, as is clearly shown by the act itself, and especially by section 11.

II. The act is unconstitutional so far as the same relates to wholesale liquor dealers.

1. Section 18 of the schedule to the constitution contains the only grant of power in the constitution to legislate upon the subject of the liquor traffic, since the grant of specific power in that section is exclusive. The evils con-

templated by that section are such as result from the sale and use of such liquors as a beverage, and at retail.

2. It is in violation of section 2, article 12, of the constitution. It is apparent from the act that the only object that can be attained by imposing burdens on wholesale dealers is revenue, inasmuch as the exemption in favor of manufacturers who sell in quantities of one gallon or more at any one time is evidence conclusive of the fact that such sales were not regarded by the legislature as an evil.

No distinction can be made among those who sell in the same way and in the same quantities. The taxation must be uniform and levied by a uniform rule.

"A statute would not be constitutional which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt." *Cooley Const. Lim.* 489-490.

If real or personal property is to be taxed it must be by a uniform rule; if a license fee or a burden be imposed upon business which is in its nature injurious to the public welfare, the same uniformity must apply. Equality of burden is the principle of the constitution. Persons in the same class and property of the same kind must be subjected to the same burden. *Fields v. Commissioners*, 36 Ohio St. 481; *Exchange Bank v. Hines*, 3 Ohio St. 43; *City of Lexington v. McQuillan*, 6 Dana, 513; *St. Louis v. Spiegel*, 75 Mo. 145; *Cummings v. National Bank*, 101 U. S. 153; *Knowlton v. Supervisors*, 9 Wis. 410.

3. The law is one of a general nature and, as to wholesale dealers, is not of uniform operation throughout the state, and is therefore repugnant to section 26, article 2, of the constitution.

The uniformity of operation required applies as well to individuals and occupations as to geographical limits. The principle of selection is just as reprehensible in the one case as in the other and just as violative of this provision. *Kelley v. State*, 6 Ohio St. 269; *State v. Powers*, 38 Ohio St. 54; *Falk, Exp.*, 42 Ohio St. 638.

4. If wholesale dealers are held to be embraced within the provisions of the Dow law and subject to the burden imposed by it, the dealers in this state who may sell their goods by sample or otherwise, and if they have no place of business in the state, are not taxed. The dealer residing here, and having his place of business here, pays taxes as other merchants do, and then must pay this tax in addition, while the dealer residing outside pays nothing. The effect must necessarily be to drive dealers across the border where trade can be as advantageously prosecuted and no burdens imposed.

Rufus B. Smith and Wm. H. Taft, county solicitors, and Edward Barton, contra.

1. If the claim made by counsel for plaintiff in error, to the effect that the phrase "traffic in intoxicating liquors," as used in section 18 of the schedule to the constitution, applies only to the retail traffic, be sound, then, by parity of reasoning, the general assembly is only prohibited from licensing the retail traffic and might enact a license law, provided it was confined to the wholesale trade. Such a conclusion is unsound in law; but as it logically results from the proposition claimed that the evils against which the general assembly may provide are those which result from the retail trade only, it is clear that the proposition is itself unsound upon which the conclusion is based.

The word "traffic" is used in its ordinary sense, and means "to pass goods and commodities from one person to another, for an equivalent in goods or money." Webster. The word certainly applies to every form of buying and selling intoxicants.

The mistake of plaintiffs is in assuming that liquor can not be sold and used as a beverage unless it is drunk where sold, as in the case of a single drink. But if liquor is sold at wholesale, and is not to be used for "mechanical, pharmaceutical, or sacramental purposes," to what use is it to be put except that of a beverage?

2. The claim that the act is unconstitutional because of

the exemption from assessments in favor of manufacturers from the raw material, who sell in quantities of one gallon or more at any one time, and therefore an unjust discrimination, is unsound. The contention of plaintiffs is that "equality of burden is the principle of the constitution" in the levying of taxes, and that the Dow law violates this rule of uniformity in taxing wholesale dealers and exempting manufacturers; and hence in conflict with section 2, article 12, of the constitution. This section furnishes the governing principle for all laws levying taxes upon *property for general revenue*. But this being a tax upon *business*, and levied for the purpose of "providing against the evils resulting from the traffic in intoxicating liquors," and not for revenue, the section is not applicable to it. The uniformity there enjoined does not apply to taxes upon licenses, occupations, or business. *West. Union Tel. Co. v. Mayer*, 28 Ohio St. 536; *Mays v. Cincinnati*, 1 Ohio St. 268; *Baker v. Cincinnati*, 11 Ohio St. 534; *State v. Frame*, 39 Ohio St. 399.

8. The tax is not void for want of uniformity, because its burden rests uniformly upon all the classes upon which it is imposed, and thus answers the only requirement of uniformity that the law demands from a tax upon business or even upon property, when levied for police purposes.

The legislature has the right to tax at will different occupations and kinds of business, and different classes of occupations, and the tax can not be regarded as unjust because discriminations appear to be made in favor of or against particular trades or business, provided the tax reaches all in the particular occupations or business, or in the particular class of the occupations or business which have been selected. *Cooley Taxation*, 125, 129.

The right to tax different trades, occupations, and kinds of business necessarily involves the right to so tax without reference to the discriminations which necessarily appear to be made against other trades, occupations, and business. Such discriminations are from the very nature of such a tax inevitable. For it always happens that the

business taxed has characteristics in common with some other business exempted. But this does not make the classification unjust or the tax illegal. For there may have been reasons satisfactory to the legislature for taxing the former and exempting the latter, and the investiture of them with such a discretion has always been regarded as wise. This running into and overlapping of different classes is readily seen.

Class is defined by Webster to be "a group of individuals ranked together as possessing common characteristics." Things and men may be differently classified according to the characteristic chosen as the type. The elementary text-books used in schools enumerate among other general divisions or classes of occupation, agriculture, mining, fishing, manufacturing, and commerce. Political economy divides men into buyers and sellers, producers and consumers. But the farmer who sells a bushel of wheat is, while in the act of selling, engaged in commerce, and the same is true of the fisherman selling his fish, the miner selling his ores, and the manufacturer selling his wares. The buyer is at times a seller, the producer a consumer. The farmer is still a farmer and not a trader, even though he sells his wheat; and the manufacturer does not cease to be a manufacturer, because he takes on at times some of the characteristics of a trader.

Thus we see the fallacy of the plaintiff's claim that wholesale dealers who do not sell less than one gallon or more at any one time, and manufacturers from the raw material who do not sell in quantities less than one gallon or more at any one time, belong to the same class. The latter makes the liquor while the former does not; an important difference, and one that fixes them as members of a different class.

The following citations of authorities strongly sustain the general assembly in its right to classify and tax as may to it seem best. *Gatlin v. Turboro*, 78 N. C. 119; *State v. Chadbourn*, 80 N. C. 479; *New Orleans v. Kaufman*, 29 La. Ann. 283; *State v. Lathrop*, 10 La. Ann. 398; *Kenny v. Har-*

well, 42 Ga. 416; *Davis v. Macon*, 64 Ga. 128, 132; 1 *Desty Tax*. 309, 311; *Cooly Tax*. 179, n. 6; *State v. West*, 34 Mo. 424; *State v. Whittaker*, 33 Mo. 457; *Barton v. Morris*, 10 Phila. 360; *Norris v. Commonwealth*, 27 Pa. St. 494; *Commonwealth v. Campbell*, 33 Pa. St. 380.

Our own statutes have for years afforded us an illustration of taxation of this kind in which the general assembly has in its discretion selected certain kinds of business for taxation, discriminating against them, as plaintiffs would say, in favor of other business.

The statutes referred to are sections 2669, 2670, 2672, 4222, 4226, 4388, 4397 to 4402, of the Revised Statutes.

These statutes provide for the imposition of license fees upon various trades and occupations, such as exhibitors of shows, peddlers, auctioneers, venders of gunpowder, hucksters in the public streets, and pawnbrokers.

These taxes have been sustained by our courts on the ground that they were laid by the general assembly in the exercise of the police power for the purpose of regulating trade. *Mays v. Cincinnati*, 1 Ohio St. 268; *Baker v. Cincinnati*, 11 Ohio St. 534.

And yet there is greater discrimination made here than that which is said to exist in the Dow law.

Classification analogous to this has been made in Texas, in the liquor law of that state, and the propriety of it was not questioned in the supreme court of the United States. *Tiernen v. Rinker*, 102 U. S. 123; and in *State v. Brewster*, 39 Ohio St. 653, 658, this court say, in speaking of the classification of cities: "It is no sufficient objection to this classification that it is illusory."

But granting, for the sake of argument, that plaintiffs are right in the position they take, that there is a discrimination against wholesale dealers, which is unjust and illegal, nevertheless it is not possible to so change the act by construction that it will exempt wholesale dealers together with manufacturers. The provision is that all the traffickers shall be taxed except certain manufacturers. If the exception is void because it does not include other classes of

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dealers, it is void and falls; the act stands without it; and all traffickers, except those selling for medicinal, mechanical, or pharmaceutical purposes will be taxed. *Cooley Const. Lim.* *178; *City of St. Louis v. St. Louis Railway Co.*, 14 Mo. App. 221; *Tillman v. Cocke*, 9 Bax. 429. In this last case an exception to a law was embodied in a separate section. Part of the exception was void. It was contended that the exception must stand or fall as a whole. It was held that the exception might stand in part and fall in part. See also *Tierner v. Rinker*, 102 U. S. 123; *State v. Amery*, 12 R. I. 64. These two cases are liquor cases, and the first is a high authority, and directly in point. See also *Little Miami R. Co. v. Commissioners*, 31 Ohio St. 338, 344; *Gilpin v. Williams*, 25 Ohio St. 283; *Gibbons v. Catholic Institute*, 34 Ohio St. 289; *Bowles v. State*, 37 Ohio St. 35, 44.

SPEAR, J. The question involved in the case is whether wholesale dealers in intoxicating liquors are subject to the tax imposed "upon the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors," by the act of the general assembly passed May 14, 1886, entitled "An act providing against the evils resulting from the traffic in intoxicating liquors"? Section 8 of the act, the section more particularly involved in this inquiry, reads as follows: "The phrase 'trafficking in intoxicating liquors,' as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescriptions issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical, or sacramental purposes, but such phrase does not include the manufacturing of intoxicating liquor from the raw material, and the sale thereof by the manufacturer of the same in quantities of one gallon or more at any one time."

Counsel for plaintiffs insist that this question must be answered in the negative, and urge in support of this claim:

1. That wholesale dealers can not be included, because the phrase, "traffic in intoxicating liquors," as used in sec-

tion 18 of the schedule to the constitution, does not embrace such dealers, but applies only to the retail traffic; and if the terms of the law compel a construction including wholesale dealers, then, as to them, it is unconstitutional, being repugnant to the section of the schedule referred to, which reads as follows: "No license to traffic in intoxicating liquors shall hereafter be granted in this state; but the general assembly may, by law, provide against evils resulting therefrom."

2. The provisions of the law, so far as they may be held to apply to wholesale dealers, are in violation of section 2 of article 12 of the constitution, because the object of the act in imposing burdens upon them is revenue only, and the burdens are not uniformly imposed in that there is an unjust discrimination against the wholesale dealer and in favor of the holder of other classes of property and against the former, and in favor of the manufacturer.

8. The law is of a general nature, and, as to wholesale dealers, is not of uniform operation throughout the state, and is, therefore, repugnant to section 26 of article 2 of the constitution.

4. If wholesale dealers are held to be within the provisions of the law, the dealers of this state will be put to great disadvantage in competition with dealers from without who sell by sample, and the effect must necessarily be to drive home dealers beyond the limits of the state.

The legal propositions are all disputed by counsel for defendant, who contend that the act applies to wholesale dealers, and is a constitutional and valid law. These contrary views are enforced and illustrated by very able and ingenious arguments on the part of the respective counsel, which will be found epitomized in the preceding pages, and need not be repeated.

We do not feel called upon to enter at large into a discussion of the law. Save as to a feature not involved in the controversy here, it is the same in its provisions as the act of April 17, 1883, popularly known as the Scott law. That enactment was subjected to a critical examination by

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this court in the case of *The State v. Frame*, 39 Ohio St. 199. The present law was very fully examined in the cases of *Adler v. Whitbeck* and of *Anderson v. Brewster*, disposed of and reported at the last term, *ante*, pp. 539, 576. The conclusions reached by the court in those cases, so far as they affect questions involved here, are satisfactory, and, where applicable to this case, control it. We have no disposition to unnecessarily swell the already plethoric volume of literature upon the general subject embraced in the discussions in the various cases arising under the liquor taxing laws, and will endeavor to dispose of the case at bar as briefly as may be.

It is contended that section 8 of the statute should be construed to read as follows: "But such phrase does not include the manufacturing of intoxicating liquors from the raw material, or the sale thereof in quantities of one gallon or more at any one time." The language of the section appears to be plain, and to admit of but one meaning. It seems to explain and construe itself, and, when this is the case, the task of the interpreter can hardly be said to arise; nor, as we think, does any thing in the context have the effect to render its meaning questionable. To adopt the foregoing would be to strike out and insert, a process common in legislative bodies, but unusual in courts of justice. It is our duty to give effect to what the law-makers have put in the law, and to all of it, not to repeal and substitute. In terms the section says that selling at wholesale by the manufacturer is not the form of traffic included in the law, and specifies no other form of wholesaling as not included. It follows, therefore, necessarily, as we think, that selling at wholesale by others than the manufacturers is included within the terms of the law.

The proposition that the phrase "traffic in intoxicating liquors," used in section 18 of the schedule, applies only to the retail traffic, we are of opinion is not sound. The language of the section is clear and unambiguous, nor is there any other clause or section of the constitution which serves in the least to throw doubt upon the meaning of the words

used. Words so employed may be taken in their plain, ordinary sense, unless a different meaning is required in order to give effect to some other portion of the instrument, or unless they are varied by the language of some other portion, or the consequences following such construction would be plainly contrary to the legislative intent. No different construction is required in order to adapt the language used to the particular subject-matter, for there can be no question but that the mischiefs sought to be remedied were those arising from the improper use of intoxicating liquors, and the means intended to be legalized were legislative enactments providing against the sale or furnishing of liquor in any form that would be productive of evil. The word "traffic" has always had a well understood meaning in the popular sense. It is the passing of goods or commodities from one person to another for an equivalent in goods or money; and a trafficker is one who traffics—a trader, a merchant. No limit as to amount is fixed in the section, and it is plainly as much traffic to deal in a given commodity by the wholesale as at retail. The two forms of traffic were in existence at the time of the framing and adoption of the constitution as they now are, and it would be strange indeed if the very intelligent body of gentlemen who drafted that instrument used language naturally including both forms if it was meant to include only one. The phrase referred to had not obtained a technical meaning; hence, it is proper to attach the popular meaning, especially as neither the context nor a consideration of the consequences which would result from a literal interpretation, furnish any ground for departure from such construction. The business of the interpreter is not to improve the language in question; it is to expound it. The question for him is not so much what the law-makers meant, but what their language means. And yet, if we were at liberty to regard the history and external circumstances which led to the adoption of the section in question, and by putting ourselves in the position of those whose

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words we are to interpret, seek in that way to ascertain what those words relate to, the same result would follow, for the general scope of the subject is clearly indicated by the petitions presented and the comments of the members thereon.

Those petitions varied in form. Some prayed the adoption of a clause preventing the legislature "from passing any act authorizing the retail of intoxicating liquors;" others, a clause forbidding the legislature passing any law "whereby the sale of spirituous liquors may be granted to any one, or the traffic therein in any manner legalized;" others, a provision "prohibiting the sale of ardent spirits;" others, a clause "prohibiting traffic in intoxicating liquors;" and others that "an excise be laid on every gallon of liquor manufactured sufficient to prevent the distillation." These several phases of the question were matters of discussion, and there was no manifest haste or want of consideration in the formulating of the language of this section. On the contrary, the debates of the convention show that the section was the subject of much criticism; and while it is true that the evils which its advocates urged as most demanding correction were those of the retail traffic (the only form theretofore sought to be regulated by license), and while it is possible that some may not have realized the fullest effect of the language employed, yet the debates show beyond question that the meaning and possible effects of the proposed section were discussed, not only as affecting the retail trade, but the manufacture and all commercial dealings in liquors.

The adoption of the section was urged by some members with the avowed purpose of enabling the general assembly to provide against evils arising from any and all forms of the traffic. One member, responding to another who had advocated the adoption of the section, used this language: "The gentleman supposes that if we insert this provision into the constitution, taking away from the general assembly the power of authorizing by license the traffic in spirituous liquors, that such a provision, together with the

existing laws upon the subject, would have the effect to prevent the manufacture of and all commercial dealings in those articles. I understand that to be the substance of the gentleman's legal opinion." To this the other assented. Another member used language of this import: "I am opposed to the traffic in ardent spirits. I desire to cut it up by the roots, and drive it out of the state." Another, commenting upon the diverse views of those who had spoken upon the subject, and the possibility of the language used not conveying to the people and the general assembly the meaning intended by the framers, expressed himself in this way: "But the gentlemen should remember that our individual designs and intentions can not affect the proper and legitimate meaning of the words which we employ in this article."

The addition of a single word would have confined the effect of the section to the retail traffic. The convention chose not to insert such word, but submitted the section as we have it, and as it was adopted by the people. They used general language, and whatever naturally falls within its ordinary meaning must, in view not only of the obvious import of the words used, but of the circumstances which led to its adoption, be held to have been intended.

To the point that the language itself is controlling, may be cited the following from the opinion of Gholson, J., in *Goshorn v. Purcell*, 11 Ohio St. 649: "Particular cases or instances lead to the adoption of general rules or principles. Many of the general rules of law are thus deduced from the decision of particular cases. . . . But when particular instances lead to the adoption of a general rule, in the shape of a legislative or constitutional provision, the authority for the rule has no such limit. The rule is to be interpreted by the language employed in its enunciation, and that language, when clear and comprehensive, is not to be limited in view of the particular instances which may be supposed to have led to the adoption of the rule."

There is, too, much significance in the point made by defendant's counsel in their brief that the mode of submission

throws light upon the understanding of the people as well as of the convention as to the meaning of the section. In voting, those who favored it voted a ballot having on it: "License to sell intoxicating liquors, no;" while those who were opposed voted a ticket having on it: "License to sell intoxicating liquors, yes." The people who voted the former ticket can not have supposed that when they voted "no." on the proposition to license the sale of intoxicating liquors, they were voting "yes" as to the wholesale trade, or leaving the question of license or no license as to that form of traffic an open one for legislative discretion. Yet this result would follow if the construction claimed by plaintiffs is the true one. It is clear that the word "therefrom" in the second clause refers to the phrase "traffic in intoxicating liquors" in the first clause, and if the word "therefrom" is confined to the retail traffic then it follows that the same construction must be given its equivalent in the first clause.

But even if it should be admitted that the evils contemplated by section eighteen are those of the retail traffic alone, still it would not follow that the act, in the particular complained of, is unconstitutional, for power to legislate generally upon the subject is conferred by section one of article 2 of the constitution. That section provides that "the legislative power of this state shall be vested in a general assembly." This essential power may be exercised upon all subjects to which it is applicable to such extent as the government may see fit to carry it, and unless restrained by other sections it is clearly within legislative competency to select this object of taxation, and place upon it such burdens as in the discretion of the law-making power may be wise and expedient. It does not now admit of controversy in Ohio that the power to levy taxes is a part of this legislative authority, and that, except so far as restrained by other provisions, the power is unlimited, and may be exercised for the accomplishment of lawful objects in regard to any property or business within the state.

The second proposition of plaintiff's counsel implies that section 2 of article 12 of the constitution affords a limitation upon that power, and that the provisions of the law in question, as to wholesale dealers, are in violation of that section, because, while the section requires that laws shall be passed taxing property by a uniform rule, this law, so far as wholesale dealers are concerned, is for revenue only, and unjustly discriminates between the wholesale dealer and the manufacturer, and between the wholesale dealer as to his property and the holder of other kinds of property, inasmuch as the former is required to pay a tax under this law and general taxes under the general tax law in addition. To this it may be answered that the law does not purport to be for revenue, but to provide against evils, and, to construe it as a revenue law it must be shown that there are no evils incident to the wholesale traffic, and, in contemplation of law, that none can arise, a proposition which, we think, can not be maintained.

The first liquor law enacted under the present constitution made it an offense to sell intoxicating liquor to a person intoxicated, to one in the habit of becoming intoxicated, or to a minor, and these provisions have been in force ever since. True, the evils here sought to be guarded against sprang chiefly from sales in small quantities. But will any one say that evils are likely to arise from the sale to such a person of a drink of liquor, and none likely to follow the sale to the same person of a gallon? We assume not. And of *all* evils, and how they may be provided against, the general assembly is, by the constitution, made the judge. The whole field of choice is left to that body, and so long as it keeps within constitutional limits, no supervising power exists in the courts to say that the choice has not been wisely made. This law, as to its taxing features, operates upon a business and not upon property within the meaning of the section referred to, and hence is not required to be uniform in its application to all forms of the traffic or to all classes. We need not enlarge upon this. The opinions and holdings of this court in *Adler v. Whitbeck*, *supra*, and *Anderson v.*

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Brewster, supra, treat at length of the question and dispose of the proposition.

Nor is the proposition tenable that the law being of a general nature is not of uniform operation throughout the state, and for that reason repugnant to section 26 of article 2 of the constitution. True, the law is of a general nature and does discriminate between the general dealer and the manufacturer. It requires one to pay, and the other, where the sales are of one gullon and over, is exempted. This implies a division of the two into separate classes, but does not show that because of that fact the law is not of uniform operation. The principle of uniform operation requires simply that the law shall bear equally in its burdens upon persons standing in the same category. A law is uniform in its operation where every person who is brought within the relation and circumstances provided for is alike affected by the law. It must have a uniform operation upon all those included within the class upon which it purports to operate. It is not claimed that the law does not purport to operate equally upon all wholesalers who are not manufacturers. As between the wholesale dealer and the manufacturer there is manifestly a real, tangible difference, though they have characteristics in common. The general assembly has chosen to classify and to discriminate accordingly. If the classification is proper the discrimination can not be objected to. We are not prepared to say that the classification is not warranted. The question in its general aspects is fully discussed and disposed of satisfactorily in the opinion in *Adler v. Whitbeck, supra*, and, we think, the argument of defendant's counsel in this case will be found to amply meet the special phase of the question presented by the record.

Respecting the claim that if the law is held to apply to wholesale dealers they will be put to great disadvantage and driven from the state, it is enough to say that the consideration relates to the wisdom of the law, and not, in any sense, to its validity, and is addressed wholly to the general assembly. The court has no concern with it.

Motion overruled.

OWEN, C. J., dissents.

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Criminal law—Failure of jury to agree—Discharge—Omission to show reason of discharge in journal entry—Correction at subsequent term by order nunc pro tunc—Attorney—Privileged communications.

1. After the submission of a criminal case to a jury, their retirement to their room for deliberation, and their failure to agree upon a verdict, they were discharged by the court. The following entry was thereupon made by the court upon the trial docket: "Jury impaneled and sworn. Trial had. Jury discharged for the reason that there was no probability of jurors agreeing. Recognizance fixed at \$1,000. Continued." At the second term of the court thereafter the defendant was again put upon his trial to a jury upon the same indictment. He moved the court to discharge him from further prosecution, offering in evidence in support of his motion the journal entry of the proceedings at the former trial, from which had been omitted the recital from the court docket of the reason of the discharge of the jury. Thereupon the state moved the court to supply such omission by an order *nunc pro tunc*, which was done, the motion to discharge the defendant overruled, and the trial allowed to proceed. *Held*, there was no error in such action of the court.
2. The statements of one accused of crime made to one whose regular employment is, and for many years has been, practicing law before justices of the peace, and whose aid and counsel is sought as such attorney or counselor, such statements being made in answer to the inquiries of such adviser as to what the facts concerning the alleged offense were, are privileged communications, and it is error to allow such adviser to testify, upon the trial of the accused, to the statements so made, although the witness had not been admitted to practice in the courts of record of the state.

ERROR to the Court of Common Pleas of Meigs county.

At the January term of the court of common pleas of Meigs county, 1886, the plaintiff in error, Arthur E. Benedict, was put upon his trial to a jury upon an indictment charging him with procuring an abortion upon one Maggie Rathburn. After the submission of the case to the jury, and after they had been for some time in their room, they came into court and reported that they could not agree upon a verdict. The court being satisfied that there was no probability of an agreement, discharged the jury, and made an entry upon the court docket in the following words: "Jury impaneled and sworn. Trial

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had. Jury discharged for the reason that there was no probability of jurors agreeing. Recognizance fixed at \$1,000. Recognizance with sureties entered into. Continued."

The clerk of the court, in making up the journal, by inadvertence omitted to journalize the statement from the court docket that there was no probability of the jurors agreeing. No exception to the action of the court in discharging the jury was made or taken by the prisoner.

At the September term of the court, 1886, being the second term after the discharge of the jury, the prisoner was again put upon his trial, upon the same indictment, when, after the jury was sworn, the prisoner moved the court in writing to discharge him from further prosecution in the case for the alleged reason that, at the January term of the court, 1886, a jury was duly impaneled and sworn in the case, and, after hearing the testimony, arguments of counsel, and charge of the court, retired to their room to consider of their verdict, and afterward returned into court without delivering any verdict, and that thereupon the court, without consent of the defendant, discharged the jury from further consideration of the case, without stating upon the journal of the court any reason for so doing. The only evidence offered to sustain this motion was the journal entry of the order above mentioned discharging the jury, from which was omitted the statement that there was no probability of the jurors agreeing. Thereupon the state moved the court for a *nunc pro tunc* order to be entered as of the January term, 1886, reciting that the jury was discharged at that term for the reason that there was no probability of the jurors agreeing. The only evidence offered in support of this motion was the entry made by the presiding judge on the court docket at the January term, 1886, which is given above. The motion to enter the *nunc pro tunc* order was sustained, to which the prisoner excepted. Thereupon the court overruled the motion to discharge the prisoner, to which, also, he excepted.

Upon the trial, the state gave evidence tending to prove that the prisoner committed the offense charged against him on the 12th of June, 1884; and there was no evidence tending

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to prove any attempt to commit it on any other day. The prisoner offered himself as a witness in his own behalf to testify, among other things, that several days after the 12th of June, 1884, Maggie Rathburn told him that nothing came of the attempted abortion, and that she was still pregnant; and requested him to continue his attempts at abortion. The objection of the state to the testimony so offered was sustained by the court, to which the prisoner excepted.

Thereupon the prisoner offered as a witness one Clara Benedict, by whom he offered to prove that Maggie Rathburn had said to her on the 2d of July, 1884, that she, Maggie, was still pregnant, and that she stood up and pointed to her person, saying: "Put your hand on me there and you will discover that I am still in the family-way." The objection of the state to this testimony was sustained by the court, to which the prisoner excepted. Thereupon the prisoner offered in evidence two letters of Maggie Rathburn, one addressed to the prisoner and one to Clara Benedict, both written after the 12th of June, 1884, and also separate paragraphs of each, as distinct propositions, but what particular paragraphs were so offered is not disclosed by the bill of exceptions. Much of the matter contained in each letter is clearly irrelevant to the issue. The objection of the state to their admission in evidence was sustained by the court, to which the prisoner excepted.

Upon the trial the state offered as a witness one James Petty, who was asked if at any time in 1884, after the 12th of June, he had any conversation with the prisoner concerning his relations with Maggie Rathburn. He answered that he had. Thereupon, by leave of the court, the counsel for the prisoner asked the witness if he was not an attorney at law and if the conversation was not one between him and the prisoner in his relation to the latter as such attorney. The answer of the witness was that he followed the business of practicing law before justices of the peace, and had done so for many years, but that he had not been admitted to the bar. He also said that the prisoner sought his aid and advice in his capacity as such counselor or attorney. The prisoner's objection to the testimony of the witness concerning any admissions made by

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the prisoner to him was overruled by the court, to which exceptions were duly taken. The witness then testified that in a conversation which he had with the prisoner after the 12th of June, 1884, the latter admitted to the witness that he had attempted to procure an abortion upon Maggie Rathburn on June 12, 1884, at the time and place named in the indictment. On further cross-examination the witness said that the prisoner had come to him at the time of the conversation and asked his advice as an attorney and adviser, and that the admissions were made in reply to the question of witness as to what the facts were. The court overruled the motion of the prisoner to rule out the testimony of the witness relating to the alleged admissions, to which exceptions were taken.

The prisoner was convicted; a new trial was refused, and to reverse the judgment of conviction the present proceeding in error is prosecuted. The errors assigned and relied upon for a reversal of the judgment below are the several rulings which are recited in the foregoing statement of facts.

C. H. Grosvenor and John S. Giles, for plaintiff in error.

The discharge of the jury was equivalent to an acquittal. *Hines v. State*, 24 Ohio St. 134; *Mitchell v. State*, 42 Ohio St. 383; *Adams v. State*, 99 Ind. 244; *Powell v. State*, 17 Tex. App. 345; *Whitten v. State*, 61 Miss. 717; *Maden v. Emmons*, 83 Ind. 331; *State v. Connor*, 5 Cold. 311; *Stewart v. State*, 15 Ohio St. 155; *Dobbins v. State*, 14 Ohio St. 493; *Wright v. State*, 5 Ind. 290; *Poage v. State*, 3 Ohio St. 229; *State v. Walker*, 26 Ind. 346; *Rulo v. State*, 19 Ind. 298; *Grant v. People*, 4 Parker Cr. Rep. N. Y. 527; *McCorkle v. State*, 14 Ind. 39.

The court had no jurisdiction of the case after the January term, 1886, and the entry *nunc pro tunc*, made at the second term thereafter, was *coram non iudice* and void. *Ludlow v. Johnston*, 3 Ohio 575; *Markward v. Doriat*, 21 Ohio St. 637; 1 Bish. Crim. Proc., secs. 1296, 1342.

The minutes of the court on the trial docket, the only testimony offered, was parol evidence and inadmissible. *Ludlow v. Johnston*, 3 Ohio 579.

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There was error in admitting the testimony of Petty. The statutory privilege should be liberally construed. *Parker v. Carter*, 4 Munf. 273; *Jackson v. French*, 3 Wend. 339.

J. A. Kohler, attorney-general, and *J. H. Lockart*, prosecuting attorney, for the state.

The motion of the plaintiff in error to be discharged in the court of common pleas was properly overruled, because :

1. The jury had been impaneled and sworn and the accused stood upon the general issue of "not guilty." In support of this see Harris' *Crim. Law*, 306, 307; *Nicholls v. State*, 2 South, 539; *Rev. Stat.*, secs. 7253-7256.

2. The motion did not answer the purpose of a plea in bar *autrefois acquit*. 1 Bish. *Cr. Proc.*, secs. 810, 812, 813, 814, 816; Harris' *Crim. Law*, 304, 309; *Rev. Stats.*, secs. 7257-7260.

The court had authority to make the entry *nunc pro tunc*. 1 Bish. *Crim. Proc.*, secs. 1156, 1160; *Freem. Judg.*, sec. 63; *Dobbins v. State*, 14 Ohio St. 493.

OWEN, C. J. 1. It is contended by the plaintiff in error that upon the record of the court as it existed at the time he was put upon his trial at the September term, 1886, he was entitled to his discharge, and that it was not in the power of the court to abridge or take away that right by so amending the record as to make it appear that the jury, at the former trial, was discharged upon sufficient ground. It is well established that the discharge of a jury in a criminal case without the consent of the defendant, after it has been duly impaneled and sworn, but before verdict, is equivalent to a verdict of acquittal, unless the discharge was ordered in consequence of such necessity as the law regards as imperative, and that in such case the record must show the existence of the necessity which required such discharge, otherwise the defendant will be exonerated from the liability of further answering to the indictment. *Hines v. The State*, 24 Ohio St. 134.

Section 7813, Revised Statutes, as amended 78 Ohio L. 89, provides that "the court may discharge a jury, without prejudice to the prosecution, for the sickness of a juror, the corrup-

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tion of a juror, or other accident or calamity, or because there is no probability of the jurors agreeing, and the reason for the discharge shall be entered on the journal." It is maintained by the plaintiff in error that the discharge of the jury at the January term of the court without the consent of the defendant, and without entering upon the journal some lawful ground for the discharge, was equivalent to an acquittal, and that the court was without jurisdiction to make the *nunc pro tunc* order. *Ludlow v. Johnston*, 3 Ohio, 575, is cited in support of this proposition. The two propositions upon which that case proceeded are: 1. "An order of court, authorizing an executor or administrator to sell decedent's lands, made when the power of the court had ceased, can not be made valid by entering it *nunc pro tunc* as of a preceding term." 2. "An order *nunc pro tunc* can not be founded upon mere parol proof of what was ordered to be done at a previous term, where there is no written minute to sustain it."

In that case the jurisdiction of the court over the subject-matter of the order made at the prior term had been taken away by legislation, and the evidence relied upon to sustain the order *nunc pro tunc* was exclusively parol. Without discussing the soundness of the propositions above quoted, it is enough to say that the facts of the case at bar fail to bring it within either of them. To sustain the assumption of counsel that the court was without jurisdiction to make the order *nunc pro tunc* it is necessary to assume (1) that the jury was discharged, at the former term, without sufficient cause, or (2) that if it was not there was no power in the court to make the order showing that the discharge was upon sufficient ground.

The first assumption is unwarranted and against the real facts, while the second is an assumption of the soundness of the very proposition in controversy—that the court was without power to make its records show what had been done by it at a former term, but by inadvertence omitted from the journal. The principle is fundamental that every court has a right to judge of its own records and minutes; and if it appear satisfactorily to it that an order was actually made at a former term and omitted to be entered by the clerk, it may at any

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time direct such order to be entered upon the records, as of the term when it was made. *State v. McAlpin*, 4 Iredell Law, 140; *Ludlow v. Johnston*, *supra*, 575; *Bothe v. Railway Co.*, 37 Ohio St. 149; *In re Estate of Jarrett*, 42 Ohio St. 194; *Elliott v. Plattor*, 43 Ohio St. 205; *Burnett v. The State*, 14 Tex. 455; Freeman Judgments, secs. 56 to 68. This power may be exercised in criminal prosecutions as well as in civil cases. *Exp. Beard*, 41 Tex. 234; *Smith v. State*, 1 Tex. App. 408; *Exp. Jones*, 61 Ala. 399. In the case last cited the supreme court sustained an order *nunc pro tunc* of the trial court made at a term subsequent to the trial, showing the number of days hard labor to which the defendant was sentenced, which had been left blank at the trial term. Nor are we able to find any adjudicated cases in which the time for the exercise of this power has been limited. In Massachusetts the record of a judgment was completed, by a *nunc pro tunc* order, after the lapse of twenty years. *Rugg v. Parker*, 7 Gray, 172. Freeman Judgment, sec. 56. That the evidence upon which the court acted was ample to authorize the order, if there was power to make it, will not be seriously questioned. *Metcalf v. Metcalf*, 19 Ala. 319; *Hegeler v. Henckell*, 27 Cal. 491; Freeman Judgments, sec. 61.

In the case at bar the jury was in fact discharged for the reason that there was no probability of the jurors agreeing. This was one of the grounds which authorized a discharge of a jury in a criminal case without prejudice to future prosecution upon the same indictment. The fact and reason of the action of the court were duly entered upon the court docket, and all that the court could do was done. Judicial action was taken, but there was failure so to make up the journal as to show such action. There was no time during that term of the court when the prisoner could have availed himself of the discharge of the jury. There was no legal objection to the impaneling of another jury for his trial at the same term. Had this been done he surely could not have urged that he had been virtually acquitted by the discharge of a former jury, without his consent and upon unauthorized grounds; for he certainly could not have resisted, with any show of serious-

ness, the completion of the record entry of the action of the court at any time during the term. This serves to illustrate that in fact there was nothing in the proceedings of the court which, in legal effect, worked his discharge. Let it be supposed that at that January term the prisoner had been tried and acquitted, and the clerk had failed to enter upon the journal the fact that a jury had been impaneled, a trial had, and the prisoner acquitted. Would it be claimed, in case of his being put upon his trial at a subsequent term, that there was no power in the court to direct that a *nunc pro tunc* order be made to show what action had been in fact taken by the court and jury? As no rights of third parties could have intervened in either case, it is not easy to see how the two cases can be distinguished. In either case the question resolves itself into one of the power of the court to make its records speak the truth and cause that to appear upon the journal which in fact had transpired in the course of judicial proceedings at a former term. It is maintained, however, that the case of *Markward v. Doriat*, 21 Ohio St. 637, is decisive of the case at bar. In that case the defeated party gave notice of his demand of a second trial, which the court minuted upon the court docket. It was not carried into the journal. It was held that the omission to journalize the notice could not be supplied by an order made at a subsequent term. The statute provided (S. & C. 1155, sec. 11) that the party desiring a second trial should, "at the term of the court at which judgment was rendered, enter on the records of the court notice of his demand for such second trial." The court simply say in the opinion: "The plaintiff did not, 'at the term of the court at which judgment was rendered, enter on the records of the court notice of his demand for such second trial' as provided by statute. The proceedings at the subsequent term to supply this omission could not have that effect. It was too late."

It is clear that by plain provision of the statute it was an indispensable prerequisite to the right to a second trial that the party demanding it should enter on the records of the court notice of his demand at the trial term. The party was required to see to it that the entry was made. True, in the

case at bar, the statute required that in case of the discharge of the jury before a verdict, "the reason for the discharge shall be entered on the journal." This can mean no more than that the record shall plainly exhibit the true ground upon which the discharge of the jury is ordered. The requirement that the entry shall be made at the term at which the order is made is no more emphatic than the general requirement that all orders of court not otherwise regulated by statute shall be made to appear of record at the time, or at least at the term at which they are made. It will not be denied that it is of importance, and within the contemplation of the law, that all the proceedings of a court shall be promptly recorded. It is to provide against the contingencies of omission to do this either by accident, inadvertence, or other cause, that the power to supply such omission by orders made *nunc pro tunc* has been recognized from a very early day. The distinction between the statutory requirement in the case of demand for second trial and that concerning the discharge of a jury is too apparent to call upon us to give the case last cited controlling effect in the present case. The views we have here expressed lead us to the conclusion that the action of the court below in supplying the omission to enter upon the journal of the court the reasons for the discharge of the jury by a *nunc pro tunc* order, and in refusing the application of the prisoner to be discharged from further prosecution, was authorized.

2. That there was no error in rejecting the letters offered in evidence is apparent from what appears in the statement of facts upon this branch of the case.

3. The statements of Maggie Rathburn, which the defense offered to prove were made to the prisoner and to Miss Benedict, are claimed to have been admissible upon the principle that wherever the bodily or mental feelings of an individual are material to be proved the usual expressions of such feelings, made at the time in question, are original evidence. A thoughtful consideration of the proposed testimony will make it quite apparent that the statements offered relate rather to the opinion of Miss Rathburn concerning her condition than

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to an expression of any particular bodily feeling or sensation. There was no error in excluding them.

4. The action of the court below in permitting the witness, Petty, to testify to the admissions of the prisoner concerning the offense with which he stood charged presents a question of much difficulty.

It may be conceded that the most commonly accepted view of the profession is that the privilege which was asserted in the trial below is confined to communications made to an attorney who has authority to practice his profession in courts of record.

It is equally true that there is a growing tendency in the courts to extend the rule of privilege to cases which, though not within the letter, are within the manifest spirit of the rule as it is generally understood. Counsel have assumed that the rule which our civil code prescribes applies as well in criminal proceedings. This has been determined differently by this court in *Steen v. The State*, 20 Ohio St. 333, and in *Schultz v. The State*, 32 Ohio St. 280, where it is held that the rules of evidence contained in the code of civil procedure apply only to civil actions and proceedings. This calls upon us to look to the common law and to the reason and logic of the question to determine the rules which are to prevail in the trial of criminal causes. It appears by the bill of exceptions in this case that Petty had for many years followed the business of practicing law before justices of the peace, but had not been admitted to the bar. It was in his capacity as such attorney that the prisoner sought his aid and advice. The admissions made to the witness were so made in reply to the latter's question as to what the facts were. So far as the record discloses the witness was entirely reputable in his community, and was deemed thoroughly trustworthy. This must be presumed in his favor. He had for many years practiced law in justices' courts as a regular employment. It was very natural that the prisoner, charged with a grave offense, should seek his aid and counsel. It was, too, most natural, that the prisoner, in answer to his adviser's question, should freely confide to him the secrets which he would repose in no one who did

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not sustain toward him the relation of legal adviser. The record discloses that the prisoner was not seeking, simply, the solace of some confidential friend in whom he might confide in the hour of his extremity. On the contrary, it was the counsel of some one of superior legal learning and experience he was seeking, and it was for the purpose of putting his legal adviser in possession of the facts which would enable him to give intelligent and valuable legal counsel that the confidence was reposed. Indeed, there was present every element which would invoke the application of the general rule upon this subject except the mere form of the admission of the adviser to practice in courts of record. Every consideration of reason, justice, logic, and fair-play would seem to demand that the mere artificial distinction which the state calls upon us to enforce should be made to yield to the modern tendency to apply the reason and spirit of the rule instead of adhering rigidly and sullenly to its letter. The privilege has been held to include scriveners and conveyancers as well as general counsel. 1 Wharton's Ev., sec. 581; *Knight v. Turquand*, 2 M. & W. 100; *Carpmael v. Powis*, 1 Phil. (Eng. Ch.) 687.

In *People v. Barker*, 59 Mich., s. c., 27 N. W. Rep. 546, it was held that, "confidential communications made in reliance upon the supposed relation of attorney and client, whether the party assuming to act as such is an attorney or not, are excluded upon the plainest principles of justice."

While we find much conflict in the authorities upon this question, we have no disposition to attempt to harmonize them, but prefer to place our solution of it, as applied to this case, upon the views already expressed, and hold that the witness, Petty, should not have been permitted to testify to the admissions made to him by the prisoner.

We are not called upon to declare the comprehensive rule that all statements made to persons who practice in justices' courts, during the course of consultation upon legal controversies, are privileged. We simply declare that the peculiar facts of this case called upon the court below to reject the testimony of the witness, Petty, and in admitting it there was error, for which the

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Evidence—Handwriting—Experts—Ancient documents.

1. A family resemblance between the handwriting upon one paper and that upon another tends to prove that both were written by the same person. Hence, where the identity of a person is in issue, it is competent to introduce letters or receipts claimed to be in his handwriting, for the purpose of comparison with other writings, admitted or clearly proven to have been written by him; and such comparison may be made, and an opinion expressed, by experts in handwriting.
2. It is not necessary to the admission of the papers claimed to be in the handwriting of the person whose identity is involved that they should be clearly proven to have been written by him. Any uncertainty as to this will affect the weight, but not the competency, of the evidence.
3. A letter purporting to have been written more than thirty years ago belongs to the class of instruments known as ancient documents; and, where produced from the family papers of the person to whom it had been addressed, is presumed to have been written by the person by whom it purports to have been written; and the writer and the person addressed being dead, is admissible in evidence without further proof of its authenticity. And so as to a pay-roll of a military company in the war of 1812, on which is what purports to be the signature of a soldier to a receipt for pay due him, produced from the archives of the government in the war department at Washington city.
4. The proper repository of an ancient document is the place where papers of its kind are usually deposited.

ERROR to the District Court of Union county.

The original action was a suit by the plaintiffs below to quiet their title to certain lands situate in Union county, and which they claimed as the heirs at law of the person last seized. He died in that county on September 11, 1873, and was then known by the name of Robson L. Broome. The plaintiffs, however, claimed that his right name was Levi Brewster; that he was a son of Seabury Brewster, late of Norwich, Connecticut; that he intermarried with Lucy Waterman on March 13, 1820, by whom he had two sons, Richard Brewster, a plaintiff, and Sherman Brewster, deceased, whose widow and children were the other plaintiffs; that he afterward abandoned his family, assumed the name of Robson L. Broome, removed to Union

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county and there resided to the time of his death, and was possessed of a large amount of real and personal property, the subject of controversy. A number of rival claims were set up to that of the plaintiffs; in one that his right name was Elisha Case, and in another that it was George Washington Broome; and the heirs of these persons were made parties defendant.

An appeal was taken from the judgment of the common pleas to the district court of the county, where judgment was rendered in favor of the plaintiffs below. The defendants took a bill of exceptions to the admission of certain evidence upon the trial. The admission of this evidence against the objection of the plaintiffs in error is the only error assigned upon the record. The bill, omitting the style of the case, is as follows:

"Be it remembered that . . . on the trial of said cause it became and was material for said plaintiffs to show that Robson L. Broome, the decedent in the pleadings named, was not in fact Robson L. Broome, but that he was in fact, and that his true name was Levi Brewster, and that he was the son of one Seabury Brewster, late of Norwich, in the state of Connecticut; that for the purpose of establishing that fact said plaintiffs put in evidence certain books and writings, which were either admitted or duly proven to have been in the genuine handwriting of the decedent, and written by him while living at Marysville, Union county, Ohio, under the name of Robson Lovett Broome; that to further maintain the issue on their part said plaintiffs offered, and, against the objection of said answering defendants, were permitted to put in evidence certain writings purporting to have been written by Levi Brewster, viz: A letter purporting to have been written from an *academy* in Plainfield, Connecticut, to one Elisha Brewster in Vermont, in the year of our Lord, 1810, and purporting to have been written by Levi Brewster, but without further proof of its genuineness as his writing than testimony tending to show that it was found in its proper place among the family papers of the Elisha Brewster, to whom it was addressed, and showing that said Elisha Brewster now deceased, was a brother of the Levi Brewster whose writing the letter purported to be; and

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also at the same time produced and offered, and, against the objection of the said defendants, were permitted to introduce in evidence a certain 'pay-roll' of the war of 1812, found in the archives at Washington, which purported to bear the signature of Levi Brewster as receipting for pay due him as a soldier in said service, without other proof of its genuineness as his signature than some evidence tending to show that said Levi Brewster was engaged in said service, in the company of which said paper purported to be the 'pay-roll,' and evidence showing that said pay-roll was found in its proper place, and in the proper custody, among the archives of the government of the United States in the war department at Washington, D. C.

"And also, as tending to show the connection of said R. L. Broome with said pay-roll, said plaintiffs gave in evidence handbooks in the admitted handwriting of said R. L. Broome, giving the number of the regiment and the officers thereof and the company officers, which are named as the company officers of the company in which Levi Brewster was a soldier, corresponding with the pay-roll, to the admission of which letter and pay-roll said defendants at the time excepted."

It then shows that experts in handwriting were introduced and permitted, against the objection of the plaintiffs in error, to express an opinion that, on a comparison of hands, the said genuine writings of Robson L. Broome and the said letter and signature to pay-roll were in the same handwriting.

It then adds exhibits of the different writings; states the making and overruling of a motion for a new trial; the reservation of exceptions, and the order of the court making it a part of the record; and is duly signed and sealed by the judges comprising the court.

W. B. Loomis and C. H. Grosvenor for plaintiffs in error.

J. W. Robinson for defendants in error.

MINSHALL, J. The principal issue of fact in the case was, whether Levi Brewster, the ancestor of the plaintiffs, was the same person who was known in Union county by the name of Robson L. Broome, and died possessed of the property in con-

troversy. As tending to support the issue on their part, the plaintiffs introduced (1) a letter purporting to have been written by Levi Brewster in the year 1810 from an academy in Connecticut, addressed to Elisha Brewster, as his brother. No other evidence was introduced that it had been so written than that it had been obtained from the family papers of Elisha Brewster, then deceased, who was the brother of Levi. Also (2) a pay-roll of 7th company, 20th regiment, in the war of 1812, on which one Levi Brewster appears as receipting for pay as a private in said company, with evidence tending to show that he had been a private in the same; but no evidence was introduced to show that he in fact signed the roll, other than that it was produced from the archives of the government in the war department at Washington city.

As standards of comparison they also introduced (3) certain books and writings, admitted or duly proven to be in the genuine handwriting of the decedent, written by him while living at Marysville, in Union county, under the name of Robson L. Broome.

Experts were then called who, upon a comparison of the writings, testified that, in their opinions, the letter and the signature to the pay-roll were in the same handwriting as were the books and writings that had been introduced as standards of comparison.

Two objections are made to the admissibility of this evidence: (1) That it is not shown that the letter was written, nor that the pay-roll was signed, by the Levi Brewster whom the plaintiffs claim to have been their ancestor. (2) That proof of handwriting by comparison of hands is not competent for the purpose of proving the identity of a person.

1. We do not understand from the bill of exceptions that there was any serious controversy in the case as to the name of the ancestor of the plaintiffs, or as to who were his relatives. These facts we may assume were reduced to reasonable, if not absolute certainty. So that this objection must be understood as applying to the introduction of the letter and pay-roll for comparison with the admitted writings of Broome, without other evidence that the letter had been written or the pay-roll

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signed by Levi Brewster, the ancestor of the plaintiffs, than as before stated.

It is true there was no direct evidence as to who wrote the letter, or as to who signed the pay-roll. The letter was written in 1810, and the pay-roll was signed in 1814. It would have been difficult, if not impossible, to show the fact by direct testimony after such a lapse of time. But more or less credit has always been attached to ancient documents without other proof of their authenticity than that of their production from proper depositories. Where any document purporting or proved to be thirty years old is produced from its proper custody, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting. Steph. Dig. Ev. 156; Whart. Ev., § 194, *et seq.*; *id.*, § 703.

This exception to the general rules of evidence rests upon a conceded necessity, (Tay. Ev., § 1874) and applies not only to such instruments as are of a formal character, such as wills, bonds, and other deeds, but also to receipts, letters, entries, and all other ancient writings. 2 Phil. Ev. (10 Eng. 4 Am. ed.) 481.

Thus in *Bere v. Ward*, on the trial of an issue as to the legitimacy of a particular person, a very old letter, purporting to bear the signature of the head of the family, and brought from among the title deeds kept at the family seat, was admitted as genuine, without further proof of handwriting, by Dallas, C. J., and also by Lord Tenterden on a second trial. 2 Phil. Ev., *supra*, note 4. This ruling was followed in *Doe v. Thomas v. Beynon*, 12 A. & E. 431 where certain old letters were admitted in evidence upon the issue in the case, whether the person claiming as devisee of the writer was the person intended. They were admitted without proof of handwriting or other proof of their genuineness than that they were found among the papers of the person to whom they had been addressed, at the time of her death. In *Bertie v. Beaumont*, 2 Price, 307, an old receipt, produced by the defendant, was admitted as evidence, tending to prove a *modus* without proof

of handwriting. There was some question made as to the custody of it, having been given to a person other than the one who produced it. Upon this the chief baron observed: "It was not given to this Mr. Beaumont, but to another person of the same name, and who, of course, occupied lands in Buckland, for none but an occupier could have acquired such a receipt. That person being of the same name with the defendant, there is reasonable inference that they were so connected as to make this the proper custody; and reasonable evidence of proper custody is all that can be required, and is sufficient." In *Fenwick v. Reed*, 6 Mad. 7, it was ruled: "That a letter, appearing upon the face of it to be written by the defendant's ancestor, upon the subject of the suit, and coming out of the custody of the representative of his attorney, and dated in 1748, was admissible without proof of handwriting—the contents of the letter, like the contents of a deed, affording intrinsic evidence in its favor." The case was determined in 1821. And in *Wynne v. Tyrwhitt*, 4 B. & Ald. 376, it was said by the court: "The rule is not confined to deeds or wills, but extends to letters and other written documents coming from the proper custody. It is founded on the antiquity of the instrument, and the great difficulty, nay, impossibility, of proving the handwriting of the party after such a lapse of time."

It is true that the admission of written instruments, without other proof of their genuineness than that which arises from their age and custody, opens the door to error and fraud. But this is no more so, when they are introduced for the purpose of establishing the identity of a person by a comparison of hands, than when introduced for any other purpose. In commenting on the possibility of error and fraud attending the admission of ancient documents as evidence Prof. Wharton says: "No doubt ancient documents, as well as modern, may be forged." To this he makes two replies: "In the first place, while documents attested by witnesses since deceased have been forged, the fact that there is a possibility of such falsification is an objection to credibility, but not to competency. In the second place, by requiring that the docu-

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ment should be taken from the proper depository, the probability of falsification is greatly diminished." 1 Whart. Ev., § 194. This has been regarded as an adequate ground for the admission of such documents in evidence without further proofs of their authenticity by most writers on evidence. 2 Phil. Ev., *supra*, 480. No evidence is entirely free from infirmities of some kind. An honest witness may err in his recollection of what he has seen or heard, or his own senses may have been deceived in what passed under his observation; or, on the other hand, the witness may be dishonest, and not tell the truth. But the possibility of error is not a ground for rejection of evidence in any case. It goes to its weight, and is to be considered by the jury or the court trying the case.

2. It is a well settled rule in this state that, where the genuineness of handwriting is involved, well attested standards of the hand of the person whose writing is in question may be introduced for the purpose of comparison with that which is disputed; and that this comparison may be made, not only by persons who have seen the party write, or have acquired a knowledge of his hand by corresponding or transacting business with him, but also by persons skilled in handwriting, such as are usually called experts. *Bragg v. Colwell*, 19 Ohio St. 407; *Pavey v. Pavey*, 30 Ohio St. 600; *Calkins v. State*, 14 Ohio St. 222.

While this is not controverted, it is argued that the letter and pay-roll should not have been admitted for the purpose of comparison with the admitted writings of Broome upon any evidence less certain than that required in the case of standards. This is illogical. The fallacy consists in assuming that the letter and pay-roll are the standards, or else that the writing in dispute shall be ascertained with as much certainty as that with which it is compared, before the comparison is made. But neither assumption is true. The matter to be determined by a comparison of hands was whether the deceased, Broome, had written the letter or not, and so as to the pay-roll. And to require the same certainty as to who wrote the letter or signed the pay-roll, as is required as to the standards of the party's hand in question, would in no way aid the in-

quiry, as neither could under such a rule be introduced until such conditions had been complied with as would render the introduction of either wholly unnecessary. This is inconsistent with the principle upon which such evidence is introduced; which is to determine the authorship of that which is unknown and disputed by comparison with that which is known and undisputed. Here the known factors in the case, as presented by the bill of exceptions, were the writings of the deceased, Broome, introduced as standards. Whether he had written the letter or signed the pay-roll was a fact to be proved; and a comparison of hands would tend, at least, to solve the question, and might reduce it to reasonable certainty. For it is self-evident that proof that two writings are in the same hand is evidence that they were written by the same person.

The uncertainty that may have arisen upon a mere comparison of hands, as to whether Broome wrote the letter or signed the pay-roll, is not, on the competency of the evidence, to be confused with the uncertainty that may have existed as to whether the one had been written and the other signed by the ancestor of the plaintiffs. It is true that on a question of proof; that is to say, the weight of the evidence, the one is connected with and depends upon the other; but on a question of competency each is separate and independent; the admissibility of the letter and pay-roll rest upon their antiquity and the custody from which each was produced; the comparison of hands upon the credence which is in general attached to such evidence. We are not now considering the weight of the evidence; the only question presented by the record is the admissibility of that which was received and objected to, as shown by the bill of exceptions.

The spirit of the law of evidence permits a resort to every reasonable source of information upon a disputed question of fact arising in a case. Unless excluded by some positive exception, every thing relative to the issue is regarded as admissible; and this is extended to every hypothesis pertinent to the issue. 1 Whart. Ev., § 20. Here the hypothesis proposed by the plaintiffs below was that the letter written from the academy by a Levi Brewster, and the signature of a per-

son of the same name to the pay-roll, were in the same handwriting as were the writings introduced as standards, and admitted to be in that of the decedent. The pertinency of this hypothesis is apparent: If the fact were established, it would only remain to the plaintiffs, in order to make out their case, to show that the Levi Brewster who wrote the letter or signed the pay-roll was their ancestor. Hence, upon principle, the competency of the evidence seems very plain.

But it is argued that no instance of a case can be produced where a comparison of hands was resorted to for the purpose of proving the identity of a person, except in what is claimed to be a very questionable one—the Tichborne case. In the first place, the case just referred to is not regarded as one of questionable authority by writers on the law of evidence. 1 Whart. Ev., § 9, *et seq.* In the next place, many instances may be produced, other than that of the *Queen v. Castro*, in which a comparison of hands has been resorted to for this purpose.

In *Commonwealth v. Webster*, 5 Cush. 295, such evidence was introduced for the purpose of showing that certain anonymous letters, written in a disguised hand, addressed to the city marshal of Boston between the disappearance of the deceased and the arrest of the defendant, containing various suggestions calculated to mislead the officers of the law, had been written by the defendant. The object was to incriminate the accused by identifying him with the person who wrote the anonymous letters.

Such evidence has been received as competent for the purpose of identifying the defendant in prosecutions for sending threatening letters and in arson. Also, for a like purpose, in suits for libel. *Commonwealth v. Webster, supra*, p. 301. 2 Greenlf. Ev., § 416.

Among the various circumstances relied on as tending to show that Sir Philip Francis was the author of Junius, were, as enumerated by Prof. Wharton, that his handwriting had certain marked peculiarities. 1 Whart. Ev., § 23. This, however, could only be determined by a comparison instituted

between the writings of the supposed and the manuscript of the real author.

Again, it is resorted to in a large class of cases where there is a question as to whether the party sued is the person who signed the instrument on which the suit is brought. 1 Greenlf. Ev., § 575. In all such cases, it will be observed, the question is not as to the genuineness of the paper, but as to the identity of the party sued, with the person who signed, and is liable upon it.

The object of offering such evidence may arise in a variety of forms. A writing may be in a disguised hand, as in the Webster case, or it may have been intended as an imitation of that of some third person, as in the case of a forgery, or it may be neither disguised nor imitated, as is assumed in this case. Now, it is evident that in either of the first two instances the liability to error in forming an opinion, even by experts, will be greater than in the last one; because in both of the first two instances the writing is executed for the express purpose of deceiving, while in the latter there has been neither dissimulation nor forgery, and one specimen of genuine writing is simply compared with another. So that, on principle, there is less room for questioning the propriety of a resort to a comparison of hands in the latter, than in either of the two former instances.

The value of such evidence on a question of personal identity is strikingly illustrated in the case above referred to as that of Tichborne's. A comparison of the writings introduced in the case would convince any intelligent person that there was no truth whatever in the claim of the defendant. It disproves his identity with the real Sir Robert Tichborne. What was true in that case must be true to a greater or less extent in every instance where a case of personal identity is involved. Judicial proof is not a matter of mere arbitrary rules. Its principles are drawn from the experience and observation of men, and should be applied as they are by men in general. Every lawyer and judge of experience will confirm what is said by Mr. Philips in his work on evidence: "It may be laid down as a first principle that exclusion is generally an

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evil, and admission generally safe and wise." To which he adds: "It is certain the administration of justice in our courts has suffered, not from too free admission of evidence, but from too rigid exclusion." 2 Phil. Ev. (Edward's ed). 628.

Judgment affirmed.

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ALIMONY—

After divorce in foreign jurisdiction.—A. and P. were married in West Virginia at their domicile, where A. retained his domicile, but P. went to Tennessee, where in *ex parte* proceedings, she obtained a divorce *a vinculo* from A., but as there was no personal service upon A., her application for alimony was dismissed without prejudice and to enable her to sue for it elsewhere. She then brought suit here for alimony alone, and to reach certain property in Ohio belonging to A.; in which case she obtained service upon A., who also appeared and filed pleadings in the case, and on trial the court found sufficient cause and allowed her alimony. *Held*, P. had a right thus to bring her action for alimony alone, and she could have her claim therefor determined, and, if sustained upon trial, the court could allow her reasonable alimony out of the property of A. *Woods v. Waddle*, 449.

ANCIENT DOCUMENT—

Proper repository.—The proper repository of an ancient document is the place where papers of its kind are usually deposited. *Bell v. Brewster*, 690.

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1. *Necessary averments in action to recover back illegal.*—In an action brought under section 5848, of the Revised Statutes, to recover back an assessment that has been collected, on the ground that it was illegally assessed, it is not sufficient to aver that the assessment is illegal and void, such averment being simply a legal conclusion; the facts must be stated so that the court may judge whether or not the same is illegal and void. *Pelton v. Bemis*, 51.

2. *Limitation of time where assessment divided.*—When, for the purpose of collection, an assessment is divided into two or more installments, payable annually or otherwise, the limitation of time in which the action can be brought, as provided in said section, begins to run against such install-

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ment from the time of its collection, and not from the collection of the last installment. *Id.* 51.

8. *Signature by agent to petition for improvement.*—An assessment made by the city of Columbus upon the property of an owner abutting upon North High street, who petitioned for the improvement, under the act of March 30, 1875 (and which was held to be unconstitutional in *State ex rel. v. Mitchell*, 31 Ohio St. 592), is not invalid, although it appears that some of the names, representing owners whose frontage was necessary to constitute the two-thirds of the frontage upon the street, required by the act as authority for ordering the improvement, were signed to the petition, not by themselves, but by persons assuming to act for them, where it further appears that there was no fraud in the matter, and that the agency was subsequently ratified by each owner, before the city directed the work to be done and issued its bonds for the cost of the improvement, and this is so where, under like circumstances, the agent signed his own name for that of the principal. *City of Columbus v. Sohl*, 479.

4. *Estoppel by participation in election.*—One who participates in an election for commissioners, provided by law, to superintend the improvement of a street, is estopped to question the validity of the act under which the improvement is made and is liable for the assessment made upon his property therefor. *City of Columbus v. Slyh*, 484.

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Privileged communications.—The statements of one accused of crime made to one whose regular employment is, and for many years has been, practicing law before justices of the peace, and whose aid and counsel is sought as such attorney or counselor, such statements being made in answer to the inquiries of such adviser as to what the facts concerning the alleged offense were, are privileged communications, and it is error to allow such adviser to testify, upon the trial of the accused, to the statements so made, although the witness had not been admitted to practice in the courts of record of the state. *Benedict v. The State*, 679.

AUDITOR OF COUNTY. See COUNTY AUDITOR.**BEQUEST.** See WILL.**BILL OF EXCEPTIONS—**

Signed by but one of three judges.—A paper purporting to be a bill of exceptions, signed by one judge only of the three judges holding the district court, will not be considered as part of the record, although the journal entry in the case recites that a bill of exceptions is presented, which, being found by the court to be true, is allowed, signed, sealed, and made part of the record, and no other paper purporting to be a bill of exceptions appears in the files in the case. *Shillito v. Thacker*, 43 Ohio St. 63, approved and followed. *Wagner v. Ziegler*, 59.

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Bond.

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1. *Contract of drawer of bill of exchange.*—By the act of drawing and issuing a bill of exchange, the drawer contracts that it will be accepted and paid according to its terms, and that if it is not he will pay it. *Cummings v. Kent*, 92.
2. *How liability of drawer fixed.*—The liability of the drawer of a bill of exchange is fixed by the due presentation, demand, and notice of dishonor. *Id.* 92.
3. *Contemporaneous parol agreement inadmissible.*—Evidence of a parol agreement, prior to or contemporaneous with the drawing and delivery of a bill of exchange, that the drawer is not to be liable as such, is inadmissible. *Id.* 92.
4. *Same.*—Cummings was indebted to Kent. Chamberlain was indebted to Cummings in the same amount and more. Cummings drew bills of exchange upon Chamberlain in favor of Kent for the amount of his indebtedness to the latter, which were accepted but not paid. There were due presentation, demand, and notice of dishonor. In an action by Kent upon the bills, Cummings answered that Kent agreed to take the acceptances in payment of his claim against Cummings, and that the latter drew the bills only for the purpose of assigning to Kent his claim against Chamberlain. Upon the trial, Cummings offered to prove that prior to, and at the time of drawing the bills, there was a parol agreement that he was not to be liable thereon as drawer. *Held*, the evidence was properly excluded. *Id.* 92.
5. *Acceptance of bill of exchange by agent.*—The drawee of a bill of exchange, drawn by the "Kanawha & Ohio Coal Co.," was described in the bill as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co." *Held*, that the acceptance so made was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him, parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant so accepted the bill intending to bind the drawer as his principal, and that this fact was known to the plaintiff at the time it became the owner and holder of it. *Robinson v. Kanawha Valley Bank*, 441.

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1. *Construed with reference to statutes in force when given.*—The terms of an undertaking for an injunction, construed by the statutes in force at the time of giving the same, govern as to the liability of the sureties signing it. *Krug v. Bishop*, 221.
2. *Dismissal of action, whether breach of injunction bond.*—An injunction undertaking was given in accordance with section 5576 of the Revised Statutes, and was conditioned: "that the plaintiff shall pay to the defendants the damages which they or either may sustain by reason of the injunction in this action, if it be finally decided that the injunction ought not to have been granted." On motion of part of the defendants, and because co-defendants had not been served with summons, the court dismissed the action without prejudice to another action, and the

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BOND—Continued.

- injunction was dissolved, and the costs were paid by plaintiff. Thereupon suit was brought, on the undertaking, for damages claimed by reason of the injunction. *Held*, 1. Such dismissal of the action without prejudice, and such dissolution of the injunction, do not constitute a breach of the condition of the undertaking. 2. The sureties thereon can not be required to pay damages for such injunction until it is "decided that the injunction ought not to have been granted." *Id.* 221.
3. *In action by solicitor of municipal corporation to enjoin misappropriation of money.*—Where, under the provisions of section 1777 of the Revised Statutes, a solicitor of a municipal corporation brings suit to enjoin the misappropriation of money by the council, he is not required to give an undertaking, and an injunction so allowed by a court of competent jurisdiction, or a judge thereof, operates without such undertaking being given; and the members of council, or any of them, violating the injunction after notice thereof has been served upon them, are liable to be punished for the same as for a contempt of the authority of the court. *Forsythe v. Winans*, 277.
4. *Sureties on guardian's bond concluded by settlement in probate court.*—In an action upon a guardian's bond for the recovery of the amount found due the wards upon a final settlement of the guardian's accounts in the probate court, the sureties are concluded by the settlement, and will not be heard, in the absence of fraud and collusion, to question its correctness or to demand a rehearing of the accounts. *Braiden v. Mercer*, 389.

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CONSTITUTIONAL LAW—

1. *Article 18, section 1.*—The act of the general assembly passed April 3, 1885 (82 Ohio L. 101–111), conferring certain corporate powers on cities of the first grade of the first class, is one of a general, and not of a special, nature; and, therefore, not in conflict with article 18, section 1, of the constitution, prohibiting the passage of special acts conferring such powers. *State ex rel. Attorney-General v. Hawkins*, 98.
2. *Article 4, section 1.*—The power conferred on the governor of the state

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CONSTITUTIONAL LAW—*Continued.*

- by section 1872 of the Revised Statutes, as amended by said act, to remove any members of the board of police commissioners, is administrative, and not judicial, in its nature; and, therefore, not in conflict with article 4, section 1, of the constitution, conferring judicial power on the courts of the state. *Id.* 98.
3. *Article 13, section 1—Classification.*—The act of April 3, 1885 (82 Ohio L. 101), providing for a police force in "cities of the first grade of the first class," applies to all cities of that grade and class in the state, and is a law of a general nature, having a uniform operation throughout the state, and is constitutional. *State ex rel. Attorney-General v. Hudson*, 137.
 4. *Section 19, bill of rights.*—There is no provision in the statutes whereby the owner of material taken by a supervisor for the repair of a public highway, under section 4715 of the Revised Statutes, can have his compensation assessed by a jury, as required by section 19 of the bill of rights, and it is therefore invalid; and the owner, resisting a supervisor entering upon his lands under the provisions of said section, is not guilty of resisting an officer under the provisions of section 6908 of the Revised Statutes. *Hendershot v. The State*, 208.
 5. *Article 13, section 1.*—The act of March 26, 1886, supplementary to section 1707 of the Revised Statutes (83 Ohio L. 43), is invalid, for the reason that the act is special and not general, inasmuch as the powers there conferred on cities having at the last federal census a population of 16,512, and no more, simply designates the city of Akron, and does not create a class, as Akron was the only city at that census having that population; and as the act confers corporate powers, it is in violation of section 1, article 13, of the constitution. *The State ex rel. Attorney-General v. Anderson*, 247.
 6. *Article 2, section 17—Impeachment of legislative journal.*—Where the journal of each house of the general assembly shows that a law receives the concurrence of the number of members required by the constitution for its adoption, and that it was publicly signed in the presence of each house by its presiding officer, as required by section 17, article 2, of the constitution, its authenticity can not be impeached by parol evidence that one or more of the members in either house, recorded as concurring in its adoption, had, prior thereto, been seated upon the determination of a contested election, by less than a constitutional quorum, although the concurrence of such a member, or members, was necessary to the number of votes required by the constitution for the passage of the law. *The State ex rel. Herron v. Smith*, 348.
 7. *De facto members of legislative body.*—The members so seated are, at least, *de facto* members of the house to which they belonged, and the validity of the title by which they occupy their seats can not be inquired into by the courts for the purpose of affecting the validity of laws enacted by the legislature in which they hold seats. *Id.* 348.

Constitutional Law.

CONSTITUTIONAL LAW—*Continued.*

8. *Article 1, section 1—Article 8, section 6—Article 1, section 20.*—The act of the general assembly, passed May 17, 1886, entitled "an act to establish an efficient board of public affairs in cities of the first grade of the first class" (83 Ohio L. 173), is within the legislative power conferred on the general assembly by section 1, article 1, and the requirement of section 6, article 8, of the constitution; and does not by its provisions, vesting the appointment of the board in the governor of the state, impair any of the undelegated powers, which, by section 20, article 1, are declared to "remain with the people." Whether laws so enacted for the government of cities and villages are wise or unwise, is left, by the constitution, to the wisdom of the legislature, and the courts have no power to hold them invalid, although they may differ with the legislature as to the policy of such laws. *Id.* 348.
9. *Selling liquor within two miles of fair.*—The clause "whoever sells intoxicating liquors within two miles of the place where an agricultural fair is being held . . . shall be fined," etc., contained in section 6946 of the Revised Statutes, as amended May 2, 1885 (82 Ohio L. 222), includes sales made by one whose place of business is permanently located within such distance, is not in conflict with any provision of the constitution, and is a valid law. *Heck v. The State*, 536.
10. *Taxing liquor traffic.*—It is competent to the general assembly of the state to impose a tax on the business of trafficking in intoxicating liquors as a means of providing against evils resulting therefrom. *Adler v. Whitbeck*, 539.
11. *Article 15, section 9.*—Neither the tax so imposed, nor a provision that the same shall attach as a lien on the property in which it is conducted, constitutes a license within the meaning of section 9 of article 15 of the constitution. *Id.* 539.
12. *Bill of rights, section 16—Due course of law.*—The statute imposing the tax may provide for its collection by the treasurer of the county, as other taxes are collected; may impose penalties for its non-payment; and, for the refusal of a person engaged in the business, on demand of the assessor, to sign and verify the statement of the return. And, for an injury done him in his property, such provisions do not deprive the citizen of the due course of law, secured to him by section 16 of the bill of rights, nor are they inhibited by the fourteenth amendment to the constitution of the United States. *Id.* 539.
13. *Article 2, section 26—Uniformity of operation.*—The legislature may, in providing against evils resulting from the traffic in intoxicating liquors, levy a tax upon such forms of the traffic as in its wisdom may seem best, without infringing the constitutional requirement (sec. 26, art. 2), that all laws of a general nature shall be uniform in their operation throughout the state. *Id.* 589.
14. *Dow liquor tax law valid.*—The act of the general assembly passed May 14, 1886, providing against the evils resulting from the traffic in intoxicating liquors (83 Ohio L. 157) is not, in any of these respects, in con-

Construction—Contempt of Legislative Body.

CONSTITUTIONAL LAW—Continued.

- flict with the constitution of the state nor of the United States and is a valid law. *Id.* 540.
15. *Validity of lien provision of liquor tax law.* Under the second section of the statute of May 14, 1886, known as the Dow law (88 Ohio L. 157), a valid lien is created upon the real property when the tenant holds under a lease, written or parol, made after the passage of the statute. *Anderson v. Brewster*, 576.
 16. *Article 12, section 2.*—The assessment imposed by the first section of the statute is not in conflict with the second section of the twelfth article of the constitution. *Id.* 576.
 17. *Schedule, section 18.*—The statute, so far as it provides for an assessment or tax upon the business of trafficking in intoxicating liquors, is not, in effect, a license law, and not within the inhibition of the 18th section of the schedule to the constitution. *Id.* 576.
 18. *Extension of term of constitutional office.*—Where the term of an office is fixed and limited by the constitution, there is no power in the general assembly to extend the term or tenure of such office beyond the time so limited. *State ex rel. Attorney-General v. Brewster*, 589.
 19. *Schedule, section 18.*—Section 18 of the schedule to the constitution, which provides that "no license to traffic in intoxicating liquors shall hereafter be granted in this state; but the general assembly may, by law, provide against evils resulting therefrom," applies as well to the wholesale as to the retail traffic in intoxicating liquors. *Senior v. Ratterman*, 661.
 20. *Liability of wholesale liquor dealers to tax under Dow law.*—Wholesale dealers in intoxicating liquors, who are not manufacturers, are within the terms of the act of the general assembly passed May 14, 1886, entitled "An act to provide against the evils resulting from the traffic in intoxicating liquors," and are liable to the tax therein imposed. *Id.* 661.
 21. *Article 12, section 2—Article 2, section 26.*—Said act, as applied to wholesale dealers in such liquors, is not in conflict with section 2, of article 12, of the constitution, which provides that "laws shall be passed taxing by a uniform rule all moneys," etc., nor with section 26, of article 2, of the constitution, which provides that "all laws of a general nature shall have a uniform operation throughout the state. *Id.* 661.

CONSTRUCTION. See RULES OF CONSTRUCTION.

CONTEMPT OF COURT. See INJUNCTION.

CONTEMPT OF LEGISLATIVE BODY—

1. *Power of committee to compel clerk of common pleas to produce poll-book.*—A standing committee on privileges and elections of either house of the general assembly, while engaged under the orders of such house in taking testimony and making investigations to be reported to it, in a contest for membership thereof, pending therein, with power to send for persons and papers, may, by a subpoena *duces tecum*, lawfully command a clerk of the court of common pleas, having custody thereof, to pro-

 Contested Elections—Contract.

 CONTEMPT OF LEGISLATIVE BODY — *Continued.*

duce before such committee any poll-book affecting the election involved in such contest, although this may require its removal to another county than that in which his office is situated. *Ex parte Dalton*, 142.

2. *Commitment to jail upon refusal.*—Upon the refusal of the clerk to obey the command of such subpoena, it is lawful for such house, upon his arraignment therein and further refusal, to order his commitment to jail as for contempt of its authority, until he obeys, or signifies his willingness to obey, the command of the subpoena; such imprisonment not to extend, however, beyond the pending session of the general assembly. *Id.* 148.

CONTESTED ELECTIONS. See CONSTITUTIONAL LAW, 6; CONTEMPT OF LEGISLATIVE BODY.

CONTINUANCE. See CORPORATIONS, 2.

CONTRACT. See LIFE INSURANCE, 1, 4; RULES OF CONSTRUCTION, 6, 7.

1. *Remedy of employe for wrongful discharge.*—When an employe, engaged under a contract for a specified time, the wages being payable in installments, is wrongfully discharged before the expiration of the period of hire, and all wages actually earned at the time of the discharge have been paid, an action will not lie to recover the future installments, as though actually earned, but the remedy is by action for damages arising from the breach of the contract, and one recovery upon such claim is a bar to a future action. *James v. Allen County*, 226.
2. *Construction of written agreement.*—In construing a written agreement in which the parties claim the words and expressions contain their true intent and meaning, and there is no claim of fraud or mistake, there should be given to each word and expression that plain and obvious meaning which the context and the whole instrument require to make each part consistent with the whole, and which will secure and carry into effect the object of the parties. *Railroad Company v. Railway Company*, 287.
3. *Construction where agreement consists of several writings.*—When a written agreement consists of more than one distinct writing, or contract, the different provisions of all the parts should be given due weight in ascertaining the intended meaning of any portion of the same; but, if the language is clear and distinct, and the plain and obvious meaning of the words is consistent with the whole instrument, such meaning must be taken as the intended meaning of the parties, unless other parts of the agreement not only admit of, but require, a different construction. *Id.* 288.
4. *Power of railroad company to contract against negligence of fellow-servant.*—The liability of railroad companies for injuries caused to their servants by the carelessness of other employes who are placed in authority and control over them, is founded upon considerations of public policy, and it is not competent for a railroad company to stipulate with its employes at the time, and as part of their contract of employment,

Coroner—Corporations.

CONTRACT—Continued.

that such liability shall not attach to it. *Railway Company v. Spangler*, 471.

CORONER. See OFFICE AND OFFICER, 4.

CORPORATIONS. See RIPARIAN PROPRIETOR, 7.

- 1 *Action to enforce statutory liability of stockholders—Jurisdiction—Appeal—Waiver.*—In a suit to enforce liability of stockholders, brought prior to the enactment of section 3260, Revised Statutes, by the creditor of an insolvent corporation, organized under the act entitled "An act to enable associations of persons for building hotels, and for other purposes, to become bodies corporate, passed April 5, 1866, as amended April 16, 1867," in a county where some of the stockholders reside and are summoned, but not in the county where the corporation is situate and has its principal office or place of business, where the stockholders served out of the county in which the action is pending interpose a plea to the jurisdiction as to their persons, which, upon demurrer is held against them, and they then consent to a reference of the case to a referee for trial; appear at trial; after report filed, except to same; give notice of appeal to the district court from a judgment rendered against them; perfect the appeal to that court, and there, after consenting to a reference of the case to a referee for trial, and after report made to the district court by the referee, file exceptions to such report, it is too late to question the jurisdiction of the appellate court. *Mason v. Alexander*, 318.
2. *Parties—Continuance—Jurisdiction.*—In such case (it having been shown that the indebtedness of the corporation is greatly in excess of the capital stock), where it is made to appear that a defendant, prior to the beginning of the action, had transferred his stock to a solvent holder within the jurisdiction, who owned it during the time a portion of the debts accrued, but who is not a party to the suit, it is not error to the prejudice of either stockholders or creditors for the court to adjudicate as between other stockholders who are parties and creditors, and continue the case for further proceedings as to liability of the vendor and vendee of the stock as between themselves, and as between them and creditors. Nor is the court's jurisdiction to determine the liability of such vendor at a subsequent term ousted, although the order of continuance does not in terms provide that the case is continued as to him. *Id.* 319.
3. *Interest.*—In such case it is not error to include, in the judgment rendered, interest from the date of the beginning of the suit, although the amount of recovery may thereby exceed the stockholder's original liability. *Id.* 319.
4. *Counsel fees.*—In such case the court has power to order reasonable counsel fees to plaintiff's attorneys to be paid out of the proceeds of the judgments. *Id.* 319.
5. *When assignor of stock liable.*—If, in such case, by reason of insolvency

Costs—Covenant.

CORPORATIONS—Continued.

or residence without the jurisdiction, the amount due from any stockholder is not collectible, the assignor of the stock up to the time the liability attached, may be charged with the deficiency. *Brown v. Hitchcock*, 36 Ohio St. 667, followed. *Id.* 319.

COSTS. See FEES AND COSTS; PROSECUTING ATTORNEY.

COUNCIL. See INJUNCTION.

COUNSEL. See ATTORNEY.

COUNTY AUDITOR. See OFFICE AND OFFICER, 3.

Publication of receipts and expenditures of county.—The law confers upon the county auditor, and not upon the county commissioners, the authority to select the newspapers in which the exhibit of the receipts and expenditures of the county, during the current year, shall be published. *State ex rel. Graham v. Holmes*, 489.

COUNTY COMMISSIONERS. See COUNTY AUDITOR.

COUNTY TREASURER—

Duty to pay city treasurer taxes collected under liquor laws.—In a suit brought by a city treasurer against a county treasurer to require him to pay over moneys collected by him as taxes under the act of May 14, 1886, entitled "An act providing against the evils resulting from the traffic in intoxicating liquors," an answer which alleges that such "money was paid under protest and to avoid the distraint provided by said law," does not state a defense; and in such case it is the duty of such county treasurer to pay over money so collected, according to law. *Ratterman v. The State*, 641.

COVENANT—

Running with land—Lease—Sale.—On August 20, 1866, Weare owned certain oil-producing lands subject only to the unexpired terms of leases theretofore given by his grantors. The Newburg Petroleum Company, by assignment, owned such leases, and on that day released and quitclaimed to W. all its right, title, and interest in such lands without any reservation, and it put him into possession. In part consideration for this conveyance, W. covenanted and agreed for himself with the company to pay and deliver to the company, its successors and assigns, upon the leased premises, the one-sixth part of all the oil and other mineral substances produced or pumped thereon or therefrom, daily as produced during the remainder of the terms granted in the leases. On September 3, 1866, such conveyance and agreement were duly recorded, and on that day W. sold and conveyed to sundry parties all his interest in the different parts of such lands, and he put each grantee into possession of the part so conveyed. Thereafter and during the terms of the leases W.'s grantees produced large quantities of oil from the respective parts, but W. and his grantees failed and refused to account to the N. P. Co. for such production, or to pay and deliver the one-sixth part thereof, as W. agreed to do. The N. P. Co.

Criminal Law—Deed.

COVENANT—*Continued.*

brought its action against W. and his grantees on W.'s agreement with the N. P. Co., and it sought to hold these grantees liable for the covenant of W. To the petition alleging such facts these grantees demurred. *Held*, such agreement is personal to Weare, and did not run with the land so as to bind the grantees of Weare for his failure to perform such agreement. *Newburg Petroleum Co. v. Weare*, 604.

CRIMINAL LAW. See INTOXICATING LIQUORS.

1. *Failure of jury to agree—Discharge—Omission to show reason in journal entry—Correction at subsequent term by order nunc pro tunc.*—After the submission of a criminal case to a jury, their retirement to their room for deliberation, and their failure to agree upon a verdict, they were discharged by the court. The following entry was thereupon made by the court upon the trial docket: "Jury impaneled and sworn. Trial had. Jury discharged for the reason that there was no probability of jurors agreeing. Recognizance fixed at \$1,000. Continued." At the second term of the court thereafter the defendant was again put upon his trial to a jury upon the same indictment. He moved the court to discharge him from further prosecution, offering in evidence in support of his motion the journal entry of the proceedings at the former trial, from which had been omitted the recital from the court docket of the reason of the discharge of the jury. Thereupon the state moved the court to supply such omission by an order *nunc pro tunc*, which was done, the motion to discharge the defendant overruled, and the trial allowed to proceed. *Held*, there was no error in such action of the court. *Benedict v. The State*, 679.
2. *Attorney—Privileged communications.*—The statements of one accused of crime made to one whose regular employment is, and for many years has been, practicing law before justices of the peace, and whose aid and counsel is sought as such attorney or counsellor, such statements being made in answer to the inquiries of such adviser as to what the facts concerning the alleged offense were, are privileged communications, and it is error to allow such adviser to testify, upon the trial of the accused, to the statements so made, although the witness had not been admitted to practice in the courts of the state. *Id.* 679.

DAMAGES. See MASTER AND SERVANT, 1; NEGLIGENCE, 2, 3; RIPARIAN PROPRIETOR, 4.

DEED. See MORTGAGES OF REALTY, 3.

1. *Riparian rights.*—A general deed of premises lying upon the bank of a river, in which is constructed a canal, conveys the grantor's rights to the center of the stream bounding the property. And to reserve or exclude from the grant any such rights, the conveyance should contain proper words of such reservation or exclusion. *Day v. Railroad Company*, 406.
2. *Reversion upon cessation of use.*—Where the canal company owning and operating such canal had the right only to use, for canal purposes,

Demand and Notice—Easement.

DEED—*Continued.*

- the bed and waters of such river, on ouster of such company from its corporate franchises and its dissolution by order of this court, the trustees winding up its affairs have no power to convey such rights, but they revert to the proper owners. *Id.* 406.

DEMAND AND NOTICE. See **GUARANTY.****DEMURRER.** See **PLEADING**, 1.**DEVISE.** See **WILL**, 3.**DISMISSAL OF ACTION.** See **BOND**, 2; **PRACTICE IN CIVIL CASES**, 5.**DIVORCE.** See **ALIMONY**; **DOWER.****DOMESTIC ANIMALS.** See **STATUTE OF LIMITATIONS**, 2.**DOWER**—

1. *After foreign divorce for aggression of husband.*—A woman divorced a *vinculo* by reason of the aggression of her husband, within the meaning of the act entitled "An act concerning divorce and alimony," passed March 11, 1853, who subsequently marries another man during the life of her first husband—if she survive the latter—will be entitled to dower in the real estate of which the first husband was seized at any time during the coverture. *McGill v. Deming*, 645.
2. *Subsequent marriage of woman during life of former husband.* Where husband and wife were actually domiciled in the state of California, and the wife, by reason of the aggression of her husband within the meaning of the act of March 11, 1853, was there divorced from him by a competent tribunal, having jurisdiction of both parties, and of the subject-matter of the action, upon surviving him, she became entitled to dower in his real estate in Ohio, of which he was seized during the coverture, although, after the decree of divorce and during his life, she had by marriage become the wife of another man. *Id.* 645.
3. *Aggression—Meaning of term.*—In an action brought by the wife for divorce in a court in California, she alleged among other things in her complaint, that on account of ill-treatment by her husband she had been compelled to leave him, and had never since lived or cohabited with him; and that continuously, for more than three years last past, he had been and then was habitually intemperate. The court found as facts, that the wife by reason of the husband's intemperance and cruel treatment, had been compelled to leave him; that for more than two years immediately preceding the filing of her complaint, the husband had been guilty of habitual intemperance; and it appearing to the court from the testimony in the case that all the material allegations in the complaint had been sustained and established, a divorce from the bonds of matrimony was decreed to the wife. *Held*, that the wife was divorced by reason of the aggression of her husband, within the meaning of the Ohio statute of March 11, 1853. *Id.* 645.

DOW LAW. See **INTOXICATING LIQUORS.****EASEMENT.** See **DEED**, 2.

Elections—Evidence.

ELECTIONS. See CONSTITUTIONAL LAWS.

Mandamus to compel canvassers to count votes.—The clerk of the court of common pleas and the justices called to his assistance to abstract the votes of an annual election, can not be required by mandamus to abstract votes cast for a person or persons for an office, unless the same is required to be filled by the electors at such election. *The State ex rel. Crawford v. McGregor*, 628.

ERROR. See WAIVER OF ERROR; MORTGAGES OF REALTY, 1.

- 1 *Practice—Finding of facts—Dismissal—Whether reviewable.*—A motion to dismiss a petition in error upon the alleged ground that summons in error was not served nor appearance entered within two years after the rendition of the judgment below, was heard in the circuit court upon evidence and sustained. No bill of exceptions was taken, but the court stated upon the record the facts found from the evidence, and upon which the dismissal was ordered. Upon this record the plaintiff in error seeks a reversal in this court of the order of dismissal. *Held*, 1. Section 6710, Revised Statutes, does not authorize a finding of facts in such a proceeding. 2. The order of dismissal is not reviewable upon such record, and a motion to dismiss the petition in error is well taken. *Railway Company v. Thurstin*, 525.

ESTOPPEL. See ASSESSMENTS, 4.

Former adjudication should be pleaded.—When a party claims a former adjudication of matter set up in an action to be an estoppel, such judgment should be pleaded; and where the same is not pleaded when it can be, it is not evidence conclusive of an estoppel, and testimony may be given to show the truth. *Meiss v. Gill*, 253.

EVIDENCE. See CONSTITUTIONAL LAW, 6; CONTEMPT OF LEGISLATIVE BODY, 1.

1. *Bill of exchange—Admissibility of contemporaneous parol agreement.*—Evidence of a parol agreement, prior to or contemporaneous with the drawing and delivery of a bill of exchange, that the drawer is not to be liable as such, is inadmissible. *Cummings v. Kent*, 92.
2. *Same.*—Cummings was indebted to Kent. Chamberlain was indebted to Cummings in the same amount and more. Cummings drew bills of exchange upon Chamberlain in favor of Kent for the amount of his indebtedness to the latter, which were accepted but not paid. There were due presentation, demand, and notice of dishonor. In an action by Kent upon the bills, Cummings answered that Kent agreed to take the acceptances in payment of his claim against Cummings, and that the latter drew the bills only for the purpose of assigning to Kent his claim against Chamberlain. Upon the trial Cummings offered to prove that prior to, and at the time of drawing the bills, there was a parol agreement that he was not to be liable thereon as drawer. *Held*, the evidence was properly excluded. *Id.* 92.
3. *Of former adjudication.*—When a party claims a former adjudication of matter set up in an action to be an estoppel, such judgment should be

 Will, Contest of—Words and Phrases.

2. *Innocent motive unavailing.*—An innocent motive, or an honest misconstruction of the power conferred will not save the exercise of the power, if the true purpose of it is violated. *Id.* 237.
3. *Power of appointment so exercised as to secure personal benefit invalid.*—A testator, possessed of real estate worth \$6,600, and personal property sufficient to pay his debts, devised and bequeathed to his widow his real and personal estate for her life, directing her to sell so much of the latter as would pay his debts, and made the following direction: "And I

WILL.—*Continued.*

do further authorize my wife, after my death, to dispose of all of the above said property to my heirs as she thinks best." The widow appointed to several of the heirs only five dollars each, to be paid by her grantees of parcels of the real estate. She deeded in fee-simple to one of the heirs for the consideration of \$1,000 paid to her, twenty-three acres of the land. She deeded to another of the heirs, in fee-simple, forty-three acres of the land (reserving the use of it during her life), for the consideration of \$100, the taxes, expenses of her last sickness, an attendant to be provided her during life, funeral expenses, and a tombstone at her grave. *Held*, this was an attempt to make appointments of the fee of the land for her own benefit, not intended by the testator, was an abuse of the power conferred, and void. *Id.* 237.

WILL, CONTEST OF—

Power of court to direct verdict.—In the trial of the contest of a will, where the testimony introduced does not tend to prove the issue on the part of the plaintiffs showing incapacity of the decedent to make a will at the time the will was made, it is not error for the court, at the conclusion of the plaintiffs' testimony, to direct the jury to find a verdict sustaining the will. *Wagner v. Ziegler*, 60.

WITNESS. See *Este v. Wilshire*, 636; EVIDENCE.

WORDS AND PHRASES. See OFFICE AND OFFICER, 5.

1. *Meaning of term "senior judge."*—The term "senior judge" in the act of April 7, 1882 (79 Ohio L. 79), providing for the appointment of an assistant prosecuting attorney in Lucas county, is intended to designate the judge who, at the time of such appointment, has served the longest under his present commission. *State ex rel. Belford v. Hueston*, 1.
2. *When word "heirs" essential to pass fee-simple estate.*—By a well established general rule the use of the word "heirs," or other appropriate words of perpetuity in a mortgage or other deed of conveyance of lands, is essential to pass a fee-simple estate; but this is not an inflexible rule admitting of no exception or qualification. *Brown v. National Bank*, 269.
3. *"Any former deceased husband."*—The term "any former deceased husband," in section 4162, Revised Statutes, refers to any husband who has deceased leaving a widow to whom any real estate or personal property has passed by virtue of the provisions of said section, and is not confined in its application to cases where the widow has had two or more husbands who are deceased. *Anderson v. Gilchrist*, 440.

Words and Phrases.

4. *Personal "effects and assets of the estate unadministered."*—The language "personal effects and assets of the estate unadministered," used in section 6020 of the Revised Statutes, includes the indebtedness of an administrator, resigned, to the estate on account of assets received and converted to his own use, as well as such "effects" and "assets" as remain in specie, and may be recovered by his successor in an action upon the administration bond. *Slagle v. Entrekin*, 627.

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